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THE UNIVERSITY OF ALBERTA

The Canadian Criminal Code 1892:
A Comparative Study in Codification

by

Desmond Haldane Brown

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF HISTORY
EDMONTON, ALBERTA
SPRING, 1986

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled The Canadian Criminal Code 1892: A Comparative Study in Codification, submitted by Desmond Haldane Brown in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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April 21, 1986

The laws of the most kingdoms and states have been like buildings of many pieces, and patched up from time to time according to occasions, without frame or model.

. . . this continual heaping up of laws without digesting them maketh but a chaos and confusion, and turneth the laws many times to become but snares for the people.

Then look into the state of your laws and justice of your land: purge out multiplicity of laws: clear the incertainty of them: repeal those that are snaring; and press the execution of those that are wholesome and necessary: define the jurisdiction of your courts.

Francis Bacon

This work is dedicated to my wife, Inge,
without whose encouragement and aid
I could not have written it.

ABSTRACT

Ever since its promulgation in 1892, the Canadian Criminal Code has been criticized for not being a "real" code. The thesis of this dissertation is that Canada did indeed adopt a "real" code which, since it will soon be one hundred years old, has withstood the test of time.

The work traces the immediate antecedents and the development of the Code. But to put the Canadian experience in perspective, it begins by defining the terms used in the discussion, and continues with a general account of the evolution of the concept of codification in ancient societies in order to separate out the motives which cause laws to be codified. Following chapters trace the development of legal systems in major western jurisdictions and the variants of codification which they evolved.

This experience is compared and contrasted with the development of legal systems in the colonies of British North America to demonstrate why and how the latter diverged from the former. The adoption of codes of statute law in pre-Confederation jurisdictions is discussed in detail, as is the essential preparation for codification in the Dominion: the promulgation of the Revised Statutes of Canada. The concluding chapter examines the origin, development and character of the Code, and the Parliamentary process by which it became law.

ACKNOWLEDGEMENTS

The idea for this work originated in a remark made by Lillian MacPherson, then Acting Law Librarian of the University of Alberta. I asked her if there was a history of the Code. She answered: "No. Are you going to write one?" I thought this would be a most interesting and worthwhile project and one that was long overdue. My Supervisor, Roderick Macleod, agreed. I would like to record my debt to him for his aid and encouragement through some very dark days, and also to Professors William J. Jones and Wilbur F. Bowker, as well as to the late Professor Lewis H. Thomas. Whatever literary merit the work has is due in large part to the painstaking analysis and criticism to which it has been subjected by my good friends Ann Henderson-Nichol and Stanley Gordon. I am, of course, responsible for the errors and infelicities which remain. I wish to record my sincere thanks also to the Staff of the Law Library of the University of Alberta, particularly to Peter Freeman, Patricia Remple, Neil Campbell and Elsie Rothrock.

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ABBREVIATIONS

CJ	Great Britain, House of Commons, *Journals of the House of Commons*
DCB	George W. Brown, *et al.*, eds., *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966-1986), 10 vols.
DNB	Leslie Stephen and Sydney Lee, eds., *Dictionary of National Biography* (London: Smith, Elder & Co., 1908), 23 vols.
HCL	James F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), 3 vols.
HECL	Leon Radzinowicz, *A History of English Criminal Law* (New York: Macmillan, 1948-1968), 4 vols.
HEL	William S. Holdsworth, *A History of English Law*, 7th ed. (London: Methuen, 1966), 17 vols.
LJ	Great Britain, House of Lords, *Journals of the House of Lords*
MDCB	W. Stewart Wallace, ed., *The Macmillan Dictionary of Biography*, 3rd ed. (Toronto: Macmillan, 1963).
PAC	Public Archives of Canada.
Parl. Pap.	Great Britain, Parliament, Parliamentary Papers.
P&M	Frederick Pollock and Frederic W. Maitland, *The History of English Law Before the Time of Edward I* (1898; rpt. Cambridge: Cambridge University Press, 1978), 2 vols.
SOR	Great Britain, House of Commons, *Statutes of the Realm* (1810-1822; rpt. London: Dawson, 1963), 11 vols.

INTRODUCTION

A year after the passage of the Great Reform Bill of 1832 in the Imperial Parliament, one of its principal and most eloquent advocates began a process intended to effect another great and necessary reform: the amelioration and systematization of the cruel, capricious and obscure criminal law, by a process of substantive amendment and codification. In a Commission issued to several eminent jurists and barristers Henry Brougham, Lord Chancellor, instructed them, in part, to

> digest into one Statute all the Statutes and enactments touching Crimes, and the trial and punishment thereof, and also to digest into one other Statute all the provisions of the common or unwritten Law touching the same, and to inquire and report how far it may be expedient to combine both those Statutes into one body of the Criminal Law, repealing all other statutory provisions, or how far it may be expedient to pass into a law the first-mentioned only of the said Statutes, and generally to inquire and report how far it may be expedient to consolidate the other branches of the existing Statute Law, or any of them.[1]

Although the movement for reform by codification had begun some fifty years earlier, this was the first time in nearly two hundred years that it had been made policy. While the efforts of the Commission were to no avail, in that none of the legislation proposed by it was enacted, the movement gathered strength over the years and several later Commissions sat and pondered the reform of the criminal law. Learned reports were produced and some specific areas of the criminal law were rationalized by consolidation acts. But this is all that was achieved, for although several codes were drafted and introduced in Parliament, they were withdrawn or became null and void by prorogation or dissolution, prior to third reading. The movement culminated in 1880, when a bill drafted by the eminent jurist, Sir James Fitzjames Stephen, and amended by a Commission of distinguished judges, was introduced in the House of Commons a few days after the opening of Parliament. In his opening remarks on first reading the bill's sponsor, Attorney General Sir John Holker, said that

> it attempted what had never, he believed, been attempted before--the codification of a substantial part of the law. It proposed to state in a number of terse, lucid, and comprehensive sentences, the law of England and Ireland upon the subject of ordinary crime, and also the law relating to the procedure by indictment against those who committed such crimes. This codification was exceedingly desirable, and would, if accomplished in this instance, set an example for codification of the law generally.[2]

This bill, too, was left on the order paper when Disraeli dissolved Parliament prematurely two weeks later over the question of Irish Home Rule and then lost the ensuing election. In this way, the movement toward codification of the criminal law was halted after fifty years of progress and the expenditure of much time and money.[3] To this day, English criminal law is not codified.

On the contrary, eleven years later, with no fanfare and with muted and limited advance warning, the Canadian Minister of Justice, Sir John Thompson, introduced in the Canadian Parliament a bill modeled on the work of Stephen and his judicial colleagues. Some fourteen months later, on July 9, 1892, a Canadian Criminal Code received royal assent. Thus Canada became the first self-governing jurisdiction in the British Empire to codify its criminal law.

Why was this so? Why was it possible to do in Canada in a few months what could not be done at all in England? How was Thompson able to convince legislators in the Canadian Parliament that such a bill was necessary and why did he not wait to see how affairs progressed in other British jurisdictions which were preparing to pass similar legislation? Again, why was the measure adopted in 1892; why not in the 1870s or 1880s when codification bills were before the Imperial Parliament and when assemblymen enacted criminal codes in several of the United States? In comparing the English draft with the Canadian Act, the latter is found to be much longer than the former. Why should a dominion with far fewer inhabitants and with a less complex social structure require more law than the Mother Country? This in turn raises the question of the origins of the Canadian bill: who drafted it and what were their guidelines? Was it enacted to effect substantive reform as well as systematization, or was it merely an administrative measure, an attempt to tidy up the tangled mass of statutes and common law precedents which then constituted the criminal law? While answers to these questions are of immediate interest, more fundamental questions arise, which must be answered in order to lay a firm foundation for this study and to give the reader an historical perspective: what is a "code"? why and how did the concept of codification evolve in the ancient world? why did it develop in different forms in those jurisdictions which have provided the models on which most modern codes are based, that is, in Britain, France and Germany?

Notes to Introduction

[1] Great Britain, Parliament, Parliamentary Papers, Commission, 1883, XXVI, 105.

[2] Great Britain, Parliament, Hansard, February 23, 1880, cols. 1236-7.

[3] By 1855, 49,716 pounds had been expended on the several commissions. It is not likely that the expenditure over the next twenty-five years was less than this amount. Great Britain, Parliamentary Papers, Criminal and Statute Law Commissions 1854-55 [210], XLIII, 403-06.

CHAPTER I

In the legal sense the verb "to codify" was first noted in the English language about 1800 when Jeremy Bentham said: "I propose to codify this."[1] What he proposed to codify was the vast and impenetrable forest of eighteenth-century law, and the remark was made with specific reference to his essay "A General View of a Complete Code of Laws,"[2] in which he set forth a detailed plan to achieve his aim. Moreover, while he did not define the term in so many words, the whole bent of his argument could be summarized, in general terms, by either of the current definitions of "codify" specified in the Oxford English Dictionary: "to reduce (laws) to a code; to digest ... to reduce to a general system; to systematize."[3] The derivative of the verb, the noun "codification" was also invented by Bentham or, at least, his was the first noted use of the word in print, in the title of another essay: "Papers relative to Codification and Public Instruction," published in 1817.[4] Again, he did not offer a definition of the term, but an examination of his writings leaves us in no doubt as to what process he advocated to formulate a code. The work, he said, should be "a complete digest: such is the first rule. Whatever is not in the code of laws should not be law."[5] The main part of this compendium would be made by undertaking "a general revision of the existing laws, the rejection of the antiquated and useless portions ... and the reduction of those parts which should be preserved, to a clear order, and to precise and intelligible language."[6]

In this revision all law, enacted and judge-made, would be included,[7] and would be separated into substantive law--authoritative orders creating and regulating rights--and adjectival or procedural law, both of which terms were also invented and defined by Bentham.[8] The substantive law would then be subdivided by subject and each collection would form a subgroup of the code.[9] Where new law was required, either to fill the gap created by the abrogation of previous provisions or to regulate predictable but as yet unforeseen events, it should be written in accordance with rational principles and enacted by the legislature to complete the collection.[10]

Clearly, Bentham contemplated not only the systematization of existing law, but also reform of the law. Now the process of codification itself implies reform, but administrative reform only: literally, to reformulate disparate elements and so constitute a rational and cohesive whole. But, except in matters of minor detail, codification is not synonymous with substantive reform, progressive or otherwise.[11] Hence the reader must distinguish carefully between Bentham's plan to codify the law current in his day and his proposals for substantive reform, since he himself did not make that distinction explicit.

All things considered, however, Bentham's failure to point out this difference was a very minor flaw in a conception of genius and one which was rectified as draftsmen of codified legislation gained experience. Thus, for example, the distinction is made over and over again in a discussion of the Bills of Exchange Act 1882, the first codifying enactment to pass safely the rocks and shoals of debate in the Imperial Parliament and to receive Royal assent.[12] Its draftsman was an experienced lawyer in the field, Sir MacKenzie Chalmers, who was directed that it must be "introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament."[13] Accordingly, his aim was to "reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent"; although he did stipulate that "codification pure and simple is an impossibility" because occasional doubtful points of law must be decided one way or the other.[14] That he was successful is self-evident. His experience is thus in direct contrast to that of the draftsman of the abortive Partnership Bill of 1882, which "codified the law of partnership" but failed when it "encountered the adverse trade wind of hostile mercantile opposition" because "it also proposed to effect some considerable changes in the existing law."[15] In contrast with this variant, but in line with Chalmer's concept of codification, the current definitions of the term in the Oxford English Dictionary are: the "reduction (of laws) to a code ... systematization,"[16] while Jowitt's Dictionary of English Law renders it as: "the collection of all the principles of any system of law into one body after the manner of the Codex Justinianius and other codes."[17]

Across the Channel, events moved more quickly than in England, but terminology lagged behind. Although the Napoleonic Codes were promulgated in the first decade of the nineteenth century, the term codification was not noted in French literature until 1819, and the verb codifier not until 1836.[18] While the process whereby these words entered the French language is unknown, there is a possibility that they are also attributable to Jeremy Bentham. In France, his work began to gain recognition in the 1780s. After the Revolution broke out, many of his essays were addressed directly to the National Assembly, to such effect that he was made a French citizen by that body in 1792.[19] Moreover, in 1802 his Genevan editor and translator, Etienne Dumont, began the systematic publication of a French edition of Bentham's works.[20] That these had an impact on French legislation there is no doubt. One has only to compare the Benthamite plan as set out in "A General View of a Complete Code of Laws"[21] with the enacted elements of the Napoleonic legislation to see many points of similarity, to say nothing of the public acknowledgement of Bentham's advice and assistance by the French draftsmen.[22] Hence it is not unreasonable to assume that they also adopted the English terminology, even though the Oxford English Dictionary would have it the other way round.[23] However, if the plan of the French codes is along Benthamite lines and is characterized by the integration of substantive reform with codification, definitions of current terminology are similar in content to those in the English lexica and are equally brief and unspecific. For example, "codifier" is given in the Grand Larousse as "Réunir en un code unique des textes législatifs ou réglementaires des coutumes, etc."[24] Similarly, it defines "codification" as "Action de codifier, de réunir des lois en un code; résultat de cette action," while the Lexique de termes juridiques renders it "Regroupement dans un texte d'origine généralement gouvernementale d'un ensemble souvent complexe de dispositions législatives ou réglementaires interessant une même matière."[25]

Similar terminology was invented and defined even later in Germany. The great Deutsches Wörterbuch which began to be compiled in 1854 lists no terms which are cognate with codify and codification.[26] However, the verb kodifizieren and its derivative Kodifikation appear in the 1905 edition of Muret-Sanders Enzyklopädisches Wörterbuch, with abbreviated definitions but without literary quotations to give their first noted use in the language.[27] It is possible, though, to make an educated guess as to why they were coined and defined at the end of the nineteenth century and why no first appearance is cited. From 1874 to 1896 a public debate took place concerning the codification of civil law for the new German Empire. The result was the much imitated Bürgerliches Gesetzbuch (BGB).[28] In all probability several of the authors who criticized the first draft of the BGB in a "flood of papers, pamphlets and books"[29] copied English and French practice and coined both words simultaneously as substitutes for the multi-word descriptions which had had to be employed before that time. But this is conjecture. What is not in doubt is that, irrespective of their mode of coinage, their current definitions are similar to their English and French cognates and are equally brief and unspecific. Thus the Duden renders "kodifizieren" as "Gesetze, Rechtsnormen in einem Gesetzwerk zusammenfassen" and "Kodifikation" as "Gesetzessammlung, die das gesamte Recht oder einzelne Gebiete des Rechts systematisch erfasst."[30] In the Ullstein Lexikon des Rechts, "Kodifikation" is given as "Schaffung eines Gesetzwerkes, insbes. durch Zusammenfassung verschiedener Gesetze bzw. Rechtsnormen des Gewohnheitsrechts."[31]

Unlike the multi-lingual forms of codify and codification which are of relatively recent origin, the first product of the action described by these words, a codex or book of laws, has been a well known concept since at least the early years of the first Christian millennium.[32] Moreover, it has been identified by a specific name in the vernacular tongues of England, France and Germany from the fourteenth century or earlier. Thus a "code" is defined in the *Oxford English Dictionary* as "a systematic collection or digest of the laws of a country, or of those relating to a particular subject."[33] Similar meanings are given in the *Grand Larousse* which specifies that a code is a "*Recueil de lois et de dispositions ayant force de loi dans un pays*";[34] and in the *Duden* which, with commendable brevity, equates code to *Gesetzbuch*.[35] In turn this word is stated to be a "*Buch, in dem alle Gesetze über Verordnungen zu einem bestimmten Sachgebiet enthalten sind*."[36] Legal lexica use many of the same words to say the same thing. In *Jowitt's Dictionary*, a code is specified to be "a collection or system of laws,"[37] while in the *Lexique de terms juridiques*, it is given as an "*Ensemble de lois ordonnées regroupant les matières qui font partie d'une même branche du droit*." In the *Ullstein Lexikon*, *Gesetzbuch* is rendered as "*ein Gesetz, das eine Rechtsmaterie (z.B. Handelsrecht) weitgehend regelt (z.B. Handelsgesetzbuch)*."[39]

In contrast to the rigorous and minute definition of most legal terms, all the definitions of codify and its derivatives and their various French and German cognates appear to be of a very general nature and patently loosely formulated. But there is good reason for this apparent imprecision. The lexicographers have had to come to terms not only with the theoretical constructs of legal philosophers such as Bentham, but also with the historical fact that enacted codes have been as diverse in form, content, arrangement and emphasis as the disparate jurisdictions which brought them into being. For example, the collection of Justinian which "is distinguished by the appellation of 'The Code' by way of eminence,"[40] was drafted to include all the statute law of its day, the written "Constitutions," which were arranged by title in a topical order. On promulgation it abrogated all previous enacted law.[41] Similarly, the United States Code (1970) is comprised of all the statutes in force collected, consolidated, and arranged in a coherent order, by subject and title. It does not, however, repeal any of the original statutes, nor does it include any part of the common law.[42] On the other hand, the French Code civil is based on old Roman models not noted for their rational formats.[43] It is a digest or condensation of all the prior statutory and customary law which had not been abolished during the Revolution, various old Royal Ordinances, and the Revolutionary laws. All of this material was expressly repealed when the Code came into force.[44] For the most part, the work is a collection of short, pithy paragraphs which summarize private law in "rules or principles of relatively narrow scope and of an intensely practical kind."[45] In its brevity it was not unlike the penal code adopted by the German Empire, soon after its creation in 1871. This work, which was closely modelled on the French Code pénal of 1810,[46] was a clear and systematic treatment of the indigenous criminal law, and was typical of Continental penal codes in being divided into general and special parts. It, too, abrogated all previous common or statutory law in the individual German states.[47] Hence, any definition which purports to be inclusive of all past experience must be very general and unspecific, comprising only the element which is common to that experience: namely, the systematization of the law.

The Canadian Criminal Code of 1892 was yet another variant. In some measure, it was based on the British draft bill of 1880 and so benefited from the exhaustive analysis of the criminal law by a succession of legal specialists, to say nothing of the critical examination it had received in several sessions of the Imperial Parliament. Hence, while there was no suggestion that the Canadian bill embodied a philosophical system, it was fair to say, as Sir John Thompson did when he moved second reading, that it would effect "a reduction of the law to an orderly written system, freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed."[48] He went on to say, however, that, while both statute and common law would be codified, only the statute law would be abrogated, leaving the common law in full effect.[49]

While it is thus apparent that there may be as many variants of the concept as there are codes, it is equally apparent that all of those discussed above are codes within the accepted legal definition of the word, as laid down in authoritative English, French and German lexica. This point needs not only to be made, but to be emphasized because many Canadian legal writers have held that the Criminal Code of 1892 was not really a code at all, but something much less--a collection or compilation without benefit of unifying principle. Thus, for example, in the essay "Codes and Codification," J.D. Cameron said "Our Criminal Code though called such in the Act, is not a code but a compilation or consolidation."[50] This view is also epitomized in Towards a Codification of Canadian Criminal Law which states that the Dominion legislation was not a "genuine code" but "merely the first step towards a true codification."[51] Invariably, discussion with individuals who hold this view has established that what they actually mean is that the Canadian Code is not comparable in all respects to some other variant, and that the basic cause of their misapprehension is insufficient knowledge of the origin and development of codes.[52]

NOTES TO CHAPTER I

1 OED, II, 583. Although "codify" was a new word, it was not without precedent. "Sanctify" and "fortify" are older cognates of the term in the sense that they are comprised of an English derivative of a Latin root together with the suffix "fy" from the Latin *facere*: to make. In the case of codify, "code" from *codex*--a book of laws--was joined to "fy"; OED, II, 582.

2 John Bowring, ed., *The Works of Jeremy Bentham* (1843; rpt. New York: Russell & Russell, 1962), III, 155-210.

3 OED, II, 583. "Codify" is not defined in any of the six English law dictionaries available to the writer.

4 Bowring, *Works*, IV, 451; OED, II, 583.

5 Ibid., III, 205.

6 Ibid., I, 54.

7 Ibid., III, 205.

8 Ibid., II, 539; III, 158; OED, X, 57.

9 For example, Bentham contemplated codes of civil, criminal, maritime, military and economic law. For a complete list, see Bowring, *Works*, III, 156.

10 Ibid., III, 205.

11 For example, if a statute laid down one penalty for a specific offence and a later enactment another, the draftsman of a code which combined the two would either make a decision himself, or point out the conflict to the legislature for its decision. His course of action would depend on his terms of reference. See the informative discussion on this point in Charles S. Greaves, *Criminal Law Consolidation and Amendment Acts* (London: Sweet & Maxwell, 1862), p. xii.

12 MacKenzie D. Chalmers, "An Experiment in Codification," *Law Quarterly Review*, 6 (1886), 125.

13 Ibid., 126.

14 Loc. cit.

15 Loc. cit.

16 OED, II, 583.

17 John Burke, ed., Jowitt's Dictionary of English Law, 2nd ed. (London: Sweet & Maxwell, 1977), I, 367. Codify and its derivatives are to be distinguished from "consolidation" and "statute law revision." Unfortunately, law lexica do not give abstract legal definitions of these expressions but rather combine them with other terms; the result is a description at length, rather than a definition. However, the work has been done for the legal lexicographers by Mr. Justice Scarman who has given both terms concise and authoritative definition. He renders consolidation as: "the technique whereby existing statute law on a given topic is reduced from many statutes into one," while statute law revision "is a process whereby obsolete and unnecessary enactments are removed from the statute book." Leslie Scarmen, A Code of English Law (Hull, England: University of Hull, 1966), p.5. See also OED, III, 866, which traces the historical development of the word "consolidation" as defined by Scarmen.

18 Grand Larousse de la langue française (Paris: Librairie Larousse, 1972), I, 778.

19 Mary P. Mack, Jeremy Bentham (London: Heinemann, 1962) pp. 361, 407-29. See also Elie Halévy, The Growth of Philosophic Radicalism, trans. Mary Morris (Boston, Mass.: Beacon Press, 1955), pp. 165-73.

20 Bowring, Works, I, xiv.

21 Ibid., III, 156.

22 Ibid., IV, 436.

23 The derivation of both codify and codification is "probably from modern French"; OED, II, 583.

24 Grand Larousse, I, 778. There is no entry for codifier in any available French legal lexicon.

25 Raymond Guillien et Jean Vincent, Lexique de termes juridiques, 4th ed. (Paris: Dalloz, 1978), p. 56.

26 Jacob and Wilhelm Grimm, Deutsches Wörterbuch (Leipzig: Herzel, 1854-1954).

27 Eduard Muret, Muret-Sanders Enzyklopädisches Wörterbuch (Berlin: Langenscheidtsche Verlagsbuchhandlung, 1905), III, 1226.

28 The Continental Legal History Series, Vol. 1, A General Survey of Continental Legal History (1912; rpt. New York: A.M. Kelly, 1968), p. 448; hereafter cited as General Survey. See also The German Civil Code, trans. Ian S. Forrester (South Hackensack, N.J.: Rothman, 1975), pp. xii-xiv.

29 General Survey, p. 448.

30 *Duden: Das große Wörterbuch der deutschen Sprache in sechs Bänden*, ed. Gunther Drosdowski (Mannheim: Bibliographisches Institut, 1976), IV, 1508.

31 Otto Gritschneder, ed., *Ullstein Lexikon des Rechts* (Frankfurt: Verlag Ullstein GmbH., 1971), p. 243. Like English and French law lexica no available German law dictionary defines the verb.

32 William Smith, *Dictionary of Greek and Roman Antiquities* (London: 1856), p. 301.

33 *OED*, II, 582.

34 *Grand Larousse*, II, 778.

35 *Duden*, I, 466.

36 Ibid., III, 1017. It is to be noted that these definitions express, in general terms, what enacted codes are in fact, rather than what they might be or should be. In a most able exposition [*The Science of Law* (New York: 1878), pp. 365-95], Sheldon Amos, Professor of Jurisprudence at London University, examines the basic principles on which codes should be constructed, the theoretical forms they might take, and the practical difficulties which have limited them to the less than perfect forms they have assumed in various jurisdictions. See also Courtney Ilbert, *Legislative Forms and Methods* (Oxford: Clarendon Press, 1901), pp. 122-29 for British theory and practice; and Roscoe Pound, *Jurisprudence* (St. Paul, Minn.: West Publishing, 1959), III, 725-32, for an abbreviated discussion of the theoretical aspects of codification. For a thought-provoking discussion of the general principles on which criminal law reform in Canada should be based, and a controversial outline for a fundamental revision of the Criminal Code, see Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976).

37 *Jowitt's Dictionary*, I, 366.

38 *Lexique de terms juridiques*, p. 56.

39 *Ullstein Lexikon*, p. 182. If an attempt were made to draft a definition of 'code' which included all the main variants of the concept, it would be so long and tortuous as to be virtually unintelligible. To get some idea of what would be involved in such a definition, see Bruce Donald's "Codification in Common Law Systems," in *The Australian Law Journal*, 47 (1973), 160-77. In this interesting and informative, but sometimes confusing essay, Donald divides codes into two main groups under which are a total of seven sub-groups. One begins to appreciate the difficulties of definition when it is found that his two main classifications are titled "codification of all rules of law pertaining to a given subject, regardless of original source" and "codification of laws from the same original source."

40 *Jowitt's Dictionary*, I, 366.

41 See p. 22 below.

42 United States Code, 8th ed. (Washington: U.S. Government Printing Office, 1971), I, ix.

43 General Survey, p. 285; Frederick H. Lawson, A Common Lawyer Looks at the Civil Law (Ann Arbor, Mich.: University of Michigan Law School, 1953), pp. 11, 54, 75. But see also Chapter II, Note 13, below.

44 General Survey, pp. 284, 287.

45 Lawson, Common Lawyer, p. 54.

46 Marc Ancel, Introduction, The French Penal Code, ed. G.O. Mueller, trans. Jean F. Moreau (London: Sweet & Maxwell, 1960), p. 11; Horst Schroeder, Introduction, The German Penal Code, ed. G.O. Mueller, trans. G.O. Mueller and Thomas Buergenthal (London: Sweet & Maxwell, 1961), p. 1.

47 General Survey, p. 446.

48 Canada, House of Commons, Debates, April 12, 1892, col. 1312.

49 Loc. cit.

50 The Canadian Law Times, 37 (1917), 195.

51 Towards a Codification, pp. 28, 33 (see note 36 above). For the most recent articulation of this view, but in a rather obscure formulation, see Graham Parker, "The Origins of the Canadian Criminal Code," in Essays in the History of Canadian Law, ed. David Flaherty (Toronto: Osgoode Society, 1981), p. 249.

52 In this respect, it is to be noted that F.H. Lawson, Professor of Comparative Law at Oxford, makes no such distinction between the "comprehensive criminal codes" of the common law countries and the codified enactments of civil law jurisdictions (see the discussion in his Common Lawyer, pp. 52-54). Likewise, the eminent legal scholar Glanville Williams makes no distinction between the criminal codes of common and civil law jurisdictions. He also comments favourably on the Canadian Code and its comprehensive coverage of the criminal law; Criminal Law, 2nd ed. (London: Stevens and Sons, 1961), pp. 185-86.

CHAPTER II

That there is such a strong affinity between multilingual definitions of "code" is no coincidence: rather, it is because they all stem from a common root, the Latin "codex." This word has no known antecedents in Greek or any other ancient language, and originally designated the trunk of a tree whereon, presumably, rudimentary messages or directions were inscribed. In the course of time, this meaning was modified by usage to denote first, flat pieces of wood tied together and covered with wax which served as the first Roman writing tablets and later, pieces of papyrus or parchment bound together as a book. Eventually, in imperial times, it was used to designate "any collection of laws or constitutions of the emperors. . . ."[1] But while the Romans coined the word, they by no means invented the concept, for written compilations of laws were in use long before civilization began to stir along the banks of the Tiber. In fact it appears that among the first things man recorded when he learnt to write were his laws and, as in so many other areas of endeavour, the first such compilations of which we have knowledge are those from the river-valley civilizations of the Middle East.[2]

In the oldest of these, Egypt, the link between the first use of writing and the promulgation of laws is especially strong, for mythology attributed the composition of the first codes to Thoth, the god of wisdom, and the traditional inventor of writing.[3] Proceeding from myth to historical fact, however, there is evidence that a written compilation was in use early in the third millennium B.C.[4] For in the calm backwaters of the relatively isolated Nile valley of that era Egyptian political, economic and legal institutions had advanced to the point where they were not unlike those of England in the twelfth century of the Christian era.[5] Much direct evidence of the "codified fiat of the Pharaoh"[6] is available for later periods, some of which demonstrates that the code was always available to the bench. For example, an inscription on the tomb of a vizier of the eighteenth dynasty, c. 1500 B.C., which details the sitting of his court, specifies that "the forty skins [on which the laws were inscribed] shall be open before him."[7] Further confirmation that this practice was of long standing is found in the account of Diodorus of Sicily, who wrote his History in the first century B.C., after a visit to Egypt. He, too, in describing the sitting of an Egyptian court, recounted that "the entire body of the laws was written down in eight volumes which lay before the judges."[8] It is thus apparent that there was a considerable body of law which existed chiefly for the benefit of the bench. On the one hand, judges would not have to depend on their powers of recall, as they had had to do before the invention of writing, and thus their judgements would tend to be more uniform and predictable.[9] On the other hand, administration, record keeping, court procedure, and punishments could be standardized in a known and stable body of law. It is not unreasonable to presume that the written Egyptian compilations were developed by the Pharaohs in order to promote uniformity and certainty and to enhance their reputation as judges and lawgivers.

A similar evolution had occurred in the valleys of the Tigris and the Euphrates over much the same period. But unlike Egypt, Mesopotamia was open to invasion from both north and south along its whole length, and the tides of invasion ebbed and flowed over it frequently, stranding within its boundaries diverse ethnic groups which differed in language and law. As in Egypt, Babylonian monarchs of the time promulgated legislative enactments throughout the third millennium.[10] These culminated in the Code of Hammurabi, published c. 1750 B.C., "which almost begins the world's law," and was at the same technical level as English law in the reign of Henry I.[11] Hammurabi's enactment is incised on a stele of black diorite about eight feet high; it contained 282 sections, thirty-five of which have been erased.[12] Those which remain include, inter alia, penal provisions, land laws, and sections governing commercial transactions, family relations, inheritance, and labour, arranged--to the modern eye--in a haphazard and uncoordinated fashion.[13] In short, it is the most complete code which has survived from the ancient world. In all probability the motives which had caused the systematization of Egyptian law also moved the Babylonian kings to do likewise but, in addition, they had an even more compelling reason to do so: a known, comprehensive and impartially administered law code would act as a cohesive and unifying force on the heterogeneous population of their kingdom, causing the collective memory to grow dim and to forget the law and language of the past.[14]

Quite different conditions prompted the promulgation of the laws of Solon some twelve hundred years later, in the first years of the sixth century B.C., when Athens began to assume a prominent place among the Greek city states. A prime reason for the prominence was the economic boom which it was enjoying: in addition to coasting the Levant, Greek ships could now ply the Nile with the wares of Athenian potters and agriculturalists, and make purchases with the coined money recently introduced.[15] In consequence of the inflation which ensued, smallholders who had mortgaged their acres rapidly fell into heavy debt and, ultimately, slavery to the landholding nobility. Faced with incipient revolt by the debt slaves who were aided by the newly emergent commercial middle class, the aristocracy agreed to the appointment--a virtual dictatorship--of Solon as an arbitrator with full powers to resolve the problem.[16] This he did by enacting laws which set the debt slaves free and alleviated the economic conditions, as well as by reforming penal provisions and amplifying civil legislation. Unlike the unwritten law which had preceded much of this legislation and which could be twisted to suit the purposes of unscrupulous judges, Solon's enactments were inscribed on stone tablets and displayed in public places: revolution was thus averted.[17] Euripides may have had this struggle in mind when he remarked: "When the laws are written, then the weak and wealthy have but equal right."[18]

According to the Roman historian Livy, a similar class struggle was in progress between the plebeians and the patricians in Rome, c. 460 B.C. His story is a familiar one: the overthrow of the monarchy c. 500 B.C.; monopoly of the customary unwritten law by the patricians; their conflict with the plebeians; the agreement to draft a mutually acceptable written code based on Solon's laws, and the manner in which that code--the Twelve Tables--came into being.[19] Again, like Solon's laws, it, too, was published on tablets which were erected at the Forum for all to see. While modern scholarship does not accept Livy's dates, questions the authenticity of some of the provisions of the Tables, and finds many of the details of the story mythical, no evidence has been adduced to invalidate the claim that the first written secular law of Rome had its origins in social conflict.[20] Whatever doubt there may be about the precise origin of the Twelve Tables, there is no question whatever that they were the nucleus around which the massive edifice of Roman law formed during the next millennium.[21]

In that time Rome expanded from a small, easily governable republic to an enormous sprawling empire, which included most of the known races and creeds. To meet the demands imposed by this increase, its law developed and expanded to the point where, in Gibbon's words, it "filled many thousand volumes, which no fortune could purchase and no capacity could digest."[22] Efforts were made in the early Christian era to reduce this mass and a measure of consolidation was effected by the promulgation of the Theodosian Code in 438. But real progress was not made until Justinian decreed that the Imperial Constitutions would be digested "in a single Code, under our auspicious name,"[23] so that the laws "would be placed within reach of all"[24] at small cost, and appointed a committee for the purpose. This was not the impossible task it might seem because, over the centuries, the source of the law had shifted from the popular assemblies and was now vested in the Emperor, a situation not unlike that which had prevailed in Babylon and Egypt. For this reason the Constitutions were, in fact, Imperial edicts which, if change were thought necessary, could be amended by the Emperor or by his delegated officer.[25] Hence, in seven years--A.D. 528 to 534--thousands of books and millions of lines were reviewed and what eventually emerged was much more than a simple consolidation.[26] To begin with, in accordance with Imperial instructions, the statute law was codified in a most effective manner. All enactments bearing on a single topic were gathered together and compared; abrogated laws were omitted; duplications and excess verbiage were pruned; contradictions were reconciled, and passages were reworded for greater clarity. The Constitutions which remained were arranged in the chronological order of their enactment, given a suitable title, and assigned a place in the collection according to an apparently irrational and confusing traditional order in which there is no attempt to separate out and group together the different kinds of law with which the modern reader is familiar: that is to say, for example, criminal law, commercial law, civil law.[27] The definitive version of the work, which abrogated all previous codes and constitutions, has come down to us as Justinian's revised Codex or Code.[28]

Following the publication of the Code, the material which may be crudely described as the Roman equivalent of the common law--the writings of the learned jurisconsults--was rationalized in a similar manner, with the exception that the sections under each title were arranged topically rather than chronologically and by the name of the person who had enunciated the principle. This collection was given the name Digest or Pandicts.[28] When it was finished, attention was focused on law students and a textbook was compiled for them. Finally, a further collection of statute law, enacted by Justinian to supplement the Code, was issued. The former is known as the Institutes and the latter as the Novels.[29] Together, these four collections, Code, Digest, Institutes and Novels, comprise the famous Corpus Juris Civilis or The Civil Law. However, it should be made clear that the Corpus Juris Civilis contained the entire law of Rome; it did not denote private law as opposed to criminal law, in the way that "civil law" does in many jurisdictions today. Thus, for example, criminal law was subsumed in the work, as were provisions which specified secular punishments for religious offences.[30] The compilation was comprehensive, or as comprehensive as any code can be: it covered all aspects of human endeavour and included adjective or procedural law, as well as substantive, and all prior legislation was expressly repealed.[31]

From the foregoing, it will be apparent that many early societies had sound and cogent reasons for compiling systematic collections of their laws, and that such a practice must have been considered to be of prime importance, since it often began soon after the invention or introduction of writing in those societies. But the motivating force behind codification was not the same in each case. In jurisdictions which developed strong monarchies, the first written laws may have been published, as Maine has remarked (above, page 2), to supplement the memory of the bench. But when the efficacy of the system became apparent, monarchs undoubtedly saw the practice as a means to enhance their power and prestige as lawmakers and judges. More specifically, they wanted to promote uniformity and certainty in the administration of the law, to weave disparate ethnic strands into the national fabric, and to keep their people tractable and content. Consequently, their laws tended to be long, comprehensive collections of detailed enactments or decrees which would be neither available nor comprehensible to the mass of the population. On the other hand, in states where unwritten law prevailed and codes were not imposed but were the result of a struggle to form a more pluralistic society, the emphasis was on the promulgation of short, written collections of simple, concise laws and their public display. The law then became a known and fixed quantity which the citizen could read at will. Finally, when the written law of a state had matured to the point where the interests of ruler and ruled tended to converge and its totality was beyond the comprehension of any individual, as in the late Roman Empire, a process of comparison, deletion of abrogated provisions, rewording, and systematization, in a word, codification, was a reasonable and rational method of reducing the law to manageable proportions.

In more general terms, it is apparent from this survey that there are two elements which are vitally interested in the promulgation of law codes, the state and the citizenry, and that their motives do not always coincide. While both want a rational and systematic written compilation, there is a conflict of interest over form and content. The state tends towards laws which are long and detailed, so that as many cases as possible will be covered, thus facilitating ease of administration and certainty in the law. But because man is a complex being and his legal affairs no less so, long, detailed laws are seldom clear and concise and, in fact, are usually the reverse. The citizen, on the other hand, requires laws to be short, clear and to the point, so he can inform himself quickly and accurately of what they are.[32]

Notes to Chapter II

[1] Smith, Dictionary, p. 301.

[2] Arthur S. Diamond, Primitive Law Past and Present (London: Methuen, 1971), p. 40.

[3] John H. Wigmore, A Panorama of the World's Legal Systems (Washington, D.C.: Washington Law Book Co., 1936), p. 17.

[4] Smith, Dictionary, p. 301.

[5] Diamond, Primitive Law, pp. 11, 12.

[6] James H. Breasted, ed. and trans., Ancient Records of Egypt (New York: Russell & Russell, 1962), II, 272.

[7] Ibid., p. 273. For an example of the detailed and prolix Egyptian enactments, see ibid., III, 22-23.

[8] Diodorus of Sicily, Loeb Classical Library (London, 1933), p. 13.

[9] Henry S. Maine, Ancient Law, ed. F. Pollock (London: J. Murray, 1907), p. 13.

[10] Diamond, Primitive Law, pp. 13-15.

[11] Ibid., p. 5.

[12] Stanley A. Cook, The Laws of Moses and the Code of Hammurabi (London: Adam Black, 1903), pp. 4-9.

[13] While the arrangement of an ancient code may seem unsystematic and irrational to the modern reader, it was a logical and reasonable order for the people who actually used it. See Sir Henry Maine's "Ancient Ideas Respecting the Arrangement of Codes," Fortnightly Review, 25 (May, 1879), 764-68.

[14] William Seagle, The Quest for Law (New York: Knopf, 1941), p. 12.

[15] Auguste Jarde, The Formation of the Greek People (New York: Cooper Square, 1970), pp. 191, 209.

[16] Ibid., p. 160.

[17] Max Cary, The Documentary Sources of Greek History (Oxford: Basil Blackwell, 1927), pp. 10-12.

[18] Euripedes, Suppliants (London: Heineman, 1912), III, 535.

[19] For the short, four-page text see Albert Kocourek and John Wigmore, Sources of Ancient and Primitive Law (1915; rpt. Littleton, Colorado: Fred B. Rothman, 1979), pp. 465-69.

[20] Diamond, Primitive Law, pp. 114-15.

[21] Samuel P. Scott, Preface, The Civil Law, trans. S.P. Scott (1932; rpt. New York: AMS Press, 1973), I, 10-15, hereafter cited as Civil Law. Nota bene: S.P. Scott uses the term "new constitutions" rather than the more traditional "novels."

[22] The Decline and Fall of the Roman Empire (New York: Peter Collier, 1899), IV, 339.

[23] Civil Law, Code, 1. First Preface, 1.

[24] Ibid., Digest, Second Preface, 13.

[25] William W. Buckland, A Textbook of Roman Law, 3rd ed. (Cambridge: University Press), p. 17.

[26] Civil Law, Code, First Preface, 2.

[27] Buckland, Textbook, pp. 40 ff.; see also n. 13 above.

[28] Civil Law, Code, Second Preface, 3.

[29] Buckland, Textbook, p.40; Civil Law, Institutes 1.-2.; New Constitutions: Collections 1.-9.

[30] Civil Law, New Constitutions 9. 14. 1.-15.

[31] Ibid., Digest, Second Preface, 10.

[32] Perhaps the best known manifestations of this desire are the French Declaration of the Rights of Man and the Constitution and Bill of Rights of the United States. Similarly, but on a more mundane level, it would seem that the recent publication of numerous "do-it-yourself" law books, How to Collect your Own Debts in Court, How to Buy a House Without a Lawyer, in which the relevant legislation is simplified and reduced to its essentials, also caters to the desire of the citizen for a short and simple statement of his law.

CHAPTER III

At the time of their earliest recorded contacts with Roman civilization, the Germanic peoples of Northern Europe lived in a world not unlike that of the Greeks of the Heroic Age, or that of the early Romans who contested for supremacy in the valley of the Tiber in the eighth century B.C. Like these earlier peoples, the barbarian tribesmen were pagans who worshipped a warlike pantheon of gods and organized their society on military lines. Living in nomadic tribal communities, they sustained themselves by cattle herding and a barter economy. Their law, or custom, was unwritten, and change was effected by the assent of the warriors convened in the tribal assembly. Theirs was a personal law of the members of the tribe: it was enforced regardless of their territorial location. The assembly also served as a court, where a harsh and elementary justice was meted out. It is no wonder, then, that Germanic society, as depicted in the pages of Tacitus' Germania (published A.D. 97) presented his readership with a vivid contrast to the sophisticated civilization of Imperial Rome at the height of its power and prestige.[1]

But even then Roman and barbarian were exerting an influence on each other which would eventually go far towards closing the gap between the two cultures. For example, merchants from the Empire carried the luxuries of the Orient to Goth and Vandal, together with more mundane goods, and in so doing, introduced the use of coinage north of the frontier. Treading the same paths, missionaries introduced the teaching of Christ and were eventually able to convert to the new religion most tribes in direct contact with the Romans. Accordingly, pagan gods were ousted and the harsh and still unwritten law was mitigated.[2] On the other hand, unceasing warfare on the frontier initiated many changes in Roman military affairs. One such effect was a constant and increasing drain on manpower, which led eventually to the large-scale enlistment of tribesmen as auxiliaries in the Imperial Army. While this eased the manpower problem, it also increased significantly the use of Germanic personal law in the army: under Roman law, barbarians who had enlisted as mercenaries, were accorded the right to be governed by their tribal customs.[3] This demonstrates that, on the one hand, the concept of personal law was well known to and respected by Rome and that, on the other, the tribes had not been much influenced by Roman ideas in this respect, following instead the Germanic dictum that "every man has a right to live by his own law."[4]

Hence, after the invading tribes overwhelmed the garrisons of Italy and the western provinces in the fifth century, and were becoming settled as overlords in their new domains, it comes as no surprise to learn that they retained their tribal usages and rules in legal disputes among themselves. Nor is it too surprising, in view of the historical precedent, to find that the conquerors allowed their new subjects to govern their own affairs by the familiar ius civil. It is probable, however, that they were influenced in this respect by advocates of the church whose very constitution and privileges were laid down in Imperial Constitutions, and whose own canon law resembled the ius civil in form and, to some extent, in content.[5]

But these parallel systems soon brought problems. For example, what principles governed the question of which law was to prevail in litigation between conqueror and Roman, and where were these rules to be found? More important to the Roman litigant, what was the barbarian law? The developing administrative and jurisdictional problems clearly required the issuance of written compilations of tribal laws, and it is suggested that this is a prime reason why official collections, the *leges barbarorum*, authorized by the new monarchs, began to appear before the end of the fifth century.[6] A circumstance which would seem to lend support to the proposition that the *leges* were intended primarily for use in litigation with Roman subjects is that all such compilations issued on the Continent were written in Latin.[7] To have issued them in the Germanic language of their composition would have been redundant since the Germanic element of the population knew what the law was and had been using it for centuries in its unwritten form.

The first such compilation to appear was the *Codex Euricianus* of c. 470, the customary law of the Visigoths who had occupied southern Gaul and Spain.[8] Of a somewhat different form was the *Edict* (c. 506) of Theodoric, the Ostrogothic King of Italy, whose theoretical authority to rule had been vested in him by the Eastern Emperor. While it was a collection of both Ostrogothic and Roman usages, it is important to note that it did not impose a common law on all Theodoric's subjects. Ostrogothic law was binding only on Ostrogoths, and Roman law bound only Romans.[9] Variations on this theme were the *Lex Gundobada* and the *Liber Responsorum*. Both were promulgated by Gundobad, King of the Burgundians in the early years of the sixth century; the first was a collection of Burgundian customary usages which also prevailed in Roman-Burgundian disputes, while the second was a compilation of Roman law for the monarch's new subjects.[10] Probably in an effort to strike a similar balance between the two elements in his kingdom, the Visigothic monarch, Alaric, issued a collection of Roman law in 508, the Breviary of Alaric, as a counterpart to the earlier Codex Euricianus.[11] But perhaps the most famous of the Leges Barbarorum is the Lex Salica, or the laws of the Salian Franks of north-western Gaul, prepared by order of Clovis the Frank in 508. It became the fundamental law of the Merovingian and later Carolingian monarchs, and was paramount law in some classes of litigation between Frank and Roman.[12] No specifically Roman law collections were issued in the provinces which today comprise northern France and much of Germany; the Roman element there was simply allowed to live by the law of the Empire which had prevailed before the conquest.[13] Over the years, many more collections were issued and, in time, the character of such compilations gradually changed. Instead of being wholly Germanic or wholly Roman, a blending of the two occurred, as the brief Ostogothic and Visigothic Empires formed and disintegrated and were in turn succeeded by the Frankish Empire of Charlemagne.[14]

However, what is of primary importance is that all these early collections were formulated according to a Roman plan and, as we have seen, in the language of Rome. However primitive the laws themselves might have been, and however much was left as unwritten custom, the enactments which were written were arranged under specific titles, in some sort of order, and were promulgated as a set, under the authority of the reigning monarch. They were, in short, codes of law as defined above.[15] Thus, at their inception western European laws were influenced by the Roman method, to a greater or lesser extent by Roman law itself, and were issued in the form of codes.[16]

As the Frankish Kingdom coalesced under the Merovingian and Carolingian monarchs, there arose a desire to unify the law. In part this was given effect by local officials who had been educated at the Frankish court and appointed by royal commission and who exerted their influence to bring the several tribal codes into harmony; and in part by the revision of several codes decreed by Charlemagne in 802.[17] But a more important method of achieving unity was the gradual development of a body of royal law, by the issuance of royal ordinances, or capitularies, which was binding on the whole population. This, in turn was national and territorial legislation, as opposed to the old tribal and personal usages, with its roots in Roman law and in the constitutions of the Emperors, of whom Charlemagne considered himself a successor.[18] Power to enforce the capitularies was vested in royal courts, wherein "forespeakers" from the new and rapidly developing legal profession argued their clients' cases before the bench.[19] The courts were of two kinds: those held in annual session by the king or his delegate, and those held by itinerant justices sent out on circuit by royal decree to supplement and supervise local courts, and to determine the rights of the crown by the process of inquisition.[20] In short, it can be seen that by the time of Charlemagne's death in 814, a strong centralized monarchy had developed, which included most of western Europe.

However promising, this development was not only halted within a century of his death, but his empire had completely disintegrated and with it the system of national legislation, the developing bar, and the strong royal courts. Under internal pressure from elements which resented the centralization of power in the crown and under external pressure from the attacks of Vikings in the west, Muslims in the south, and Magyars in the east, the Empire became a patchwork quilt of principalities, duchies, and lesser honours, both secular and ecclesiastical, to say nothing of numerous towns and cities which soon secured their independence. Although kings still reigned, their vested power was illusory; and their actual power was based on the manpower they could muster from the royal domains and on whatever support was forthcoming from their great feudatories. Civilization was in retreat; the basis for existence became the feudal bond between lord and vassal whereby the former secured military manpower to protect his fief or to attack his neighbour, in return for a grant of land to the vassal. These new relationships brought on legal problems which were of paramount importance in a society where land was the basis of all wealth and prosperity. Consequently, feudal courts sprang up in every fief to adjudicate such matters, to the detriment of the local courts, from which they thus took a large and important source of litigation. The latter tribunals, from which there was no appeal after the demise of the royal courts, stagnated under the control of untutored lay judges, and regressed to the point where written law was forgotten and each jurisdiction formulated a body of unwritten customary law, or the provincial coutumes.[21]

To some extent, these conditions were mitigated by the increasing jurisdiction of ecclesiastical courts, as the authority of the Pope waxed and that of the secular monarchs waned. Not only did the tribunals of the church have concurrent jurisdiction with the local courts in many secular causes, but they also operated in a hierarchical system in which a litigant had the right of final appeal to Rome.[22]

More importantly, the church maintained the link with the law of the Corpus Juris and the Roman codes of the barbarian kings by including some basic instruction on the subject in cathedral and monastery schools, after the demise of the Western Roman Empire.[23] Moreover, long before this, the law of the church--canons enacted by ecclesiastical councils, and decretals, or papal decrees--was periodically codified in the Roman style. Although such codes were compiled privately for centuries, they were eventually replaced by official collections commissioned by the Popes.[24] Gregory IX issued the first of these, the Decretale, in 1234; it was to be the sole authority in courts and schools and no other compilation was to be made without papal consent. Gregory, in short, was imitating Justinian; furthermore, the Decretale's arrangement was modelled after the Code.[25] This was no archaic revival, however, but the logical outcome of a process which had begun in the developing universities of Italy late in the tenth century: namely, the intensive study of the Corpus Juris Civilis.

In turn, this study had been brought about by the accelerating economic recovery everywhere evident after the invading hosts on Europe's borders had carved out fiefs and settled them, or had been repelled.[26] In part, this recovery manifested itself in a general rise in material prosperity, with a consequent increase in the variety and importance of personal possessions and other movable assets. Litigation concerning such property could not be heard in feudal courts, which were concerned only with land and tenements; nor could it be dealt with by the courts merchant, unless one or both litigants were merchants; nor did the ecclesiastical tribunals have jurisdiction unless the settlement of an estate was involved.[27] Thus, the only recourse for litigants was to the local customary or city courts. But these tribunals were ill equipped to deal with new problems of increasing sophistication, having no rational written system of law capable of development, and little prospect of getting any in the fragmented political and judicial conditions then prevailing. In this apparent impasse, attention was naturally drawn to a system of law which could provide answers to all the current legal questions. Moreover, popular belief held such a system to be still in force and regarded it as the common law of Europe, to which recourse could be had when customary law was silent.[28] Hence, the "revival and acceptance in western Europe of the law books of Justinian";[29] in a word, the "reception."

Before acceptance, a number of practical difficulties had to be overcome: to begin with, the sixth century compilations had to be in an understandable form, for they were written in a language familiar only to scholars. Thus, the first task was to render the text intelligible to the student of the tenth and eleventh centuries. This was done by an exegetical process which resulted in the production of "glosses." Although such works took different forms, they were essentially similar in content: a portion of the Digest or Code would be reproduced on a page, and a marginal, interlinear, or surrounding commentary would supply synonyms for obscure or difficult words, and "translate" the adjoining text.[30] At first, there was no attempt to do more than make clear the provisions of the text; but after it had been sufficiently well explained, glosses became analytical and interpretive. The most authoritative work of this kind was that of Accursius, and after his death in 1260, the writing of glosses declined to extinction.[31] But the study of the texts was continued by academics who struck out in a different direction. These were "commentators," whose aim was to expound the law of the Corpus Juris as a body of living principles, in order to provide a rational body of rules "harmonized and adapted to the city statutes, to the feudal and Germanic customs, and to the Canon law's principles."[32] This they did by providing an exhaustive commentary on all Justinian's legislation, which met with the approbation of the university law schools and the legal profession. However, after this desirable goal had been achieved, the commentators continued their fine-spun analysis and by the mid-1400s their work had degenerated into prolixity, with points of law being decided by the dogma of weight of opinion.[33]

It was at this time, with the advent of the printing press and the influx of Greek scholars fleeing from captured Constantinople, that the study of the classical texts was undertaken, which was to give rise to Humanism. Under the powerful stimulus of this movement, scholars began to find fault with the work of the earlier schools and to seek out the original sources of Roman law from which the Corpus Juris had been compiled. After searching analysis, this work itself "hitherto venerated for centuries as the perfection of legal wisdom. . .was. . .condemned as a mere secondary compilation."[34] Once this point had been reached, the way was open for unrestricted criticism and the resurrection and exegesis of Roman law, from the Twelve Tables onwards, proceeded apace all over Europe. By the opening years of the seventeenth century, when the outline of the whole of Roman law was clear, and all the known primary sources had been exhaustively analysed, centuries of scholarly activity had produced an enormous bulk of glosses, commentaries and other legal writings.

A second requirement which had to be satisfied before the reception of Roman law could take place effectively was that a bench and bar had to be trained to conduct the business of the courts according to Romanist practices and procedures. One of the most important and distinctive of the latter, the ramifications of which were instrumental in setting codified systems apart from others, was that magistrates were required to give judgements only in accordance with enacted law. While there is ample reference to this in the Corpus Juris, it is best epitomized in the Constitution of Justinian which lays it down that:

> No judge or arbitrator is to deem himself bound by juristic opinions (consultationes) which he considers wrong: still less by the decisions of learned prefects or other judges. For if an erroneous decision has been given, it ought not to be allowed to spread and so to corrupt the judgement of other magistrates. Decisions should be based on laws, not on precedents. (Non exemplis sed legibus iudicandum est.) This rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind. Our will is that all our judges adhere to the true meaning of laws and follow the path of justice.[35]

Accordingly, the bench was not bound by precedent; it developed a process of deductive reasoning whereby a judge would reason from the general legal rule specified in the Code to the facts in the case before him.[36] Therefore, even when strong, centralized monarchies emerged again in Europe, judgements varied not only among the highest national courts but also among superior and inferior tribunals, and the same court could and did overrule its own previous decisions.

Instruction in this and the myriad other distinctive features of Imperial practice proceeded concurrently with the examination of the texts from the first days of the glossators. As word of the new discipline spread throughout Europe, increasing numbers of students preparing for a career in administration, diplomacy, or law converged on

Bologna and other Italian universities, which were the first centres of such studies.[37] In turn, as learned doctors of law increased in number, they began to staff the law faculties of the new universities across the Alps, and so the teaching of the Corpus Juris, and later the Canon law, became a prerogative of these institutions.[38] As their graduates multiplied, they began to litigate in the old customary courts and in the city tribunals where they were heard with dismay by the lay judges, most of whom had no knowledge of Latin or of Roman law.[39] Such experiences naturally hastened their departure from the bench, and thus caused vacancies which were filled by Romanists. When this stage had been reached, the revivified law books of Justinian were received in almost every country in western Europe, sooner in some places, later in others.[40] However, the degree to which Roman law was accepted depended to a large extent on the political situation and the development of the indigenous law in a given jurisdiction.

In France, for example, a reviving hereditary monarchy began to create a uniform national law late in the twelfth century by promulgating ordinances which were enforced by a developing system of royal courts or parlements. These tribunals were also given appellate jurisdiction over the local territorial and city courts, which continued to dispense justice according to the unwritten coutumes. South of the Loire, this was essentially Roman law, having been elaborated from the Roman codes of the early kings. Hence, the reception here was early and virtually total. But it did not completely replace the ancient usages: rather, it supplemented and explained them, and could be cited as authority when they were silent.[41] On the other hand, in the northern provinces, where usage was rooted in the barbarian codes, the customary courts clung tenaciously to their heritage and limited the Corpus Juris to a minor role. It could be used to interpret and apply the coutumes and be pleaded in argument, but it could not be cited as authority.[42] Moreover, in order to prevent its further encroachment on provincial prerogatives, and to provide for more certainty and speed in the administration of justice, the crown was prevailed upon to decree the codification of the coutumes in 1453. This process which, with many revisions, was complete by the end of the sixteenth century, by which time royal commissions had promulgated over three hundred and fifty codes.[43] The format of many of these compilations is that of a three-by-five inch volume, which is divided into books, titles, sections and numbered paragraphs which tend to be brief and epigrammatic in style. Thus, they resemble the 1804 Code civil in appearance and format, and the content--public and private law--is similar, except for the infrequent insertion of a penal provision.[44]

In the Holy Roman Empire, virtually the reverse of this process occurred. There, the authority of the elective monarch declined from the eleventh century onwards, in consequence of the conflict with the papacy. With no real power, the Emperor could elaborate no truly national law, nor could his courts exercise appellate jurisdiction over the tribunals of his magnates and the cities. Hence, each of these several hundred petty jurisdictions developed the old barbarian customs of the locality as it saw fit, so that by the end of the thirteenth century, dozens of unofficial codes demonstrated the almost infinite and uncertain variety of German law.[45] As we have seen, such fragmented and particularistic law was inadequate for the needs of an increasingly complex and commercial society, which accordingly resorted to unorthodox legal expedients, such as bypassing the official judicial system and submitting its disputes to the law faculties of the universities for adjudication in accordance with Roman rules.[46] However, as the learned doctors from these same faculties gradually occupied the benches of the customary courts during the fourteenth and fifteenth centuries, and their students formed a Romanistic bar, such practices eventually became unnecessary.

Concurrent with these changes in personnel and practice, the form of the statute book began to be modified. The process was set in motion early in the 1400s with the publication of the Klagenspiegel, a textbook on Roman law and legal procedure intended to demonstrate the uncertainty and arbitrariness of the current Germanic system, as opposed to the efficacy of that based on the Institutes. While the work was an immediate success and exerted great influence on this aspect of the reception, it also caused attention to be focused on specifically criminal law, because the author had, in fact, written two books and included both in the same volume: the first on private law and the second on penal law and procedure.[47] Where the Klagenspiegel had led, others followed and by the turn of the century several similar texts had been published for various jurisdictions in what is now southern Germany, and elementary codes of criminal law and procedure based on these had been enacted to supplement the received Roman civil law. The most famous of these, the Carolina of 1532, was a statute of the Imperial Diet which regulated criminal procedure and, to some extent, penal law in the several jurisdictions in the Empire for over three centuries.[48] And so the replacement of Germanic law proceeded apace. By the time Luther finally broke with Rome early in the sixteenth century, the reception in the Empire was so complete that Germanic law was virtually superseded, being "recognized only as local usage," which the litigant who alleged such usage had to prove.[49]

Thus the course of events in legal development had been completely reversed in the thousand years since the Roman Empire in the west had been overrun. From the fifth century onwards, Roman law had been relegated to a secondary place--the law of the conquered--while tribal law, albeit codified in the Roman manner and tongue, had assumed paramount importance in disputes between the invaders and the indigenous population. Now, in the sixteenth century, all the law of western Europe had been Romanized to a greater or lesser degree, and in the courts judges who had taught law and jurisprudence as doctors in the universities listened to a bar composed of their former pupils argue their cases in its familiar terms, and gave judgement according to its distinctive procedure.

While it is clear that great progress had been made in the teaching of the law and in its quality and administration, its quantity, as in the time before Justinian, was prodigious. There were, first of all, the Corpus Juris and earlier Roman compilations, together with the Roman codes of the early kings. To explain, amplify and adapt this ancient body of law to local and contemporary conditions, there was the work of the glossators and commentators and the writings of the Humanists. Then there were the codes of customary law, strong and primary in some jurisdictions, weak and secondary in others. Finally, there was the legislation of the monarchs and their councils, again of varying authority, but fast becoming the preferred source of new law.

Fortunately, substantive additions to this unwieldy mass of law were few in the era of spiritual ferment which Luther's action had ushered in. Rather, the attention of legal minds was drawn to the problem of how to mitigate the appalling excesses of the religious wars of the period. Chief among these was Hugo Grotius, a brilliant Dutch lawyer and historian. He looked about and was dismayed by what he saw on every side: deceit, cruelty, pillage, and ruin. In essence, he came to argue that in any sovereign state the individual was constrained to act in a civilized manner, and so preserve decency and good order, by a body of public law enacted and enforced by the monarch. While there was no analogous international government for the community of nations and hence no public law of the nations, and certainly no authority to enforce it if there had been, there were "those laws which are perpetual and accommodated to all time. . .those which nature dictates,"[50] which should govern international relations and the conduct of nations at war: in a word, natural law.

However, "natural law" as defined by Grotius,[51] and the argument in which it is embedded in his seminal work, The Rights of War and Peace, is difficult for the modern mind to comprehend. It must have been scarcely less difficult for his contemporaries, because it caused successive generations of philosophers and legalists to attempt to clarify and give more concrete definition to his terms and arguments and to work out their ramifications. Apart from the upheaval this investigation caused in philosophy, where it led to the promulgation of the Declaration of the Rights of Man, and in political theory, where such men began to question the foundations of the state, thereby laying the groundwork for the abolition of institutions inimical to those rights, they concluded that law should be rationalized and reduced in bulk by reduction to a code.[52] While divesting the concept of natural law of the religious and mystic trappings with which the Stoics and the medieval church had enshrouded it,[53] they had become painfully aware of the confusing and enormous mass of matter which obscured and confused the rational and enduring principles of the law.[54] Moreover, they held that man-made law--public law--must conform to the law of nature, and this meant that it "must be adapted to attain the social ends of man's existence." Further, since the dictates of natural law are immutable, "the law, when thus recast in a system, could be and should be framed into a single permanent body of rules, known and accessible to all"; in short, a code.[55] But a code drafted according to these principles would be different from those which had gone before.[56] A clarified natural law would provide a pattern, existing law would be re-written and amended or abrogated to conform to the pattern, and new legislation would be enacted to make the system symmetrical and complete.[57] In other words, substantive reform and codification would go hand in hand.

Many of the enlightened despots of the day were in tune with these sentiments, at least in terms of reduction in bulk and systematization, if not with complete change in the principle of arbitrary vengeance, euphemistically termed "retribution,"[58] on which the criminal law and punishments were based. Hence, codification commissions were set up all over Europe in the eighteenth century and, where change in the penal law was contemplated, were informed by the works of legal reformers such as Montesquieu, Voltaire and Beccaria.[59] Sometimes the commissioners were dispersed without having achieved substantive results, as were those who attended Catherine the Great in the Kremlin and their contemporaries who had been convened by Louis XV at Versailles. But more often their efforts were crowned with success.[60] Thus, penal codes which showed ample evidence of judicial and technical advance over preceding compilations, were enacted in many Germanic states. In the Bavarian code of 1751, for example, many crimes were given precise definition to correct the prior "crude method of framing the laws," and punishment by mutilation was abolished.[61] In contrast to these practical reforms, the Austrian Theresiana of 1769 abandoned the principle of punishing "religious" crimes, and proclaimed that deterrence, the improvement of the offender, and the satisfaction of the state were the objectives of punishment.[62] In addition, the concept of punishment being commensurate with the crime was given practical expression by provisions which would enable the bench to mitigate or augment punishment to accord with the facts of the case.[63] But the large innovation, in terms of its lasting effect on the form of criminal codes in the civil law tradition, was the separation of these compilations into two sections, albeit in a crude and tentative manner.[64] These divisions are what have come to be known as the "general" and the "special" parts. The former lays down the principles on which the code is based. It contains such information as the classification of criminal acts--violations, misdemeanours, felonies, and other relevant detail--definitions of punishments and elements of an offence and limits of jurisdiction in terms of time and place. The "special" part defines acts which are held to be criminal, delineates the classification of each offence, and lays down the range of punishment for it.

Since this division has come to be an important and prominent feature of such codes, it would be desirable to know why it was adopted although the sources do not discuss the reasons for this development and any attempt to account for it must be speculative. The following may be considered as a hypothesis. In any study of codes drafted in the civil law tradition one cannot help being struck by the ease of cross reference offered by such enactments. The entire body of that particular law is promulgated at one time as a coherent and systematic set, usually in one volume or, then, in a uniform set of volumes. Those who compile the code are usually familiar with its entire content, and are able to save time and space by referring the reader to a section which defines, explains, or illustrates provisions in an entirely different section. On the other hand, those who use the enactment in practice are not inconvenienced by cross references, because the entire code is before them and there is no need to refer to other statutes or sources, which they may not possess or have easy access to. If this argument is accepted as valid, and since the commissioners who drafted the Austrian and Bavarian codes were educated in the civil law tradition, it is not unreasonable to speculate that, ever since the promulgation of the Carolina in the sixteenth century, it had come to be realized that much of the explanatory and administrative matter antecedent to substantive provisions was repetitious and redundant, and that a general statement with regard, for example, to the classes of crimes, to which cross references could be made when necessary, would suffice.

In general, the new compilations abrogated the customary codes both of old Germanic and received Roman law, and were subsidiary only to subsequently enacted statutes, when there was a conflict between the two.[65] As would be expected from commissions set up by authoritarian monarchs who, however enlightened, were also interested in improving the administration of the law, such codes tended to be long, detailed, and all-encompassing.[66] They were, however, a great improvement on existing systems, and brought a greater element of certainty to the law.

While the men who sat in the revolutionary legislatures during the first years of the French Revolution carried the theories of natural law with them as part of their intellectual baggage, they took a more radical view of what needed to be done by way of codification than had their successful regal predecessors in Europe. They wanted all French law reformed and codified in accordance with the ideas of the legal reformers of the 1700s,[67] and set out to achieve this objective in a simple but effective manner: in the first weeks of its sitting, the Assembly simply abolished elements of the law of which it did not approve and then enacted remedial legislation at leisure. Thus, eradication of the most oppressive features of the criminal law was effected by the promulgation of the Declaration of the Rights of Man in August, 1789, and the law of January 21, 1790.[68] The gap thus created was filled eighteen months later by the enactment of two complementary codes of substantive penal law,[69] which were based on the principles of deterrence and rehabilitation of the offender.[70] In addition to this they incorporated many of the other practical and theoretical reforms introduced in the earlier Germanic codes,[71] and followed their scheme of division into general and special parts.[72] Thus, while the French legislation was greater in scope and detail and, therefore, was a more accurate reflection of contemporary legal philosophy, there can be little doubt that it was profoundly influenced by the earlier enactments. The reform was completed four years later, in 1795, by the promulgation of a code of criminal procedure.[73]

However, in their efforts to correct the inequalities of the old penal law the legislators had often gone to opposite extremes and there were thus serious defects in the codes of 1791 and 1795. Not the least of these was that each offence was to be punished with a specific penalty which was required to be pronounced on conviction and which could not be pardoned, mitigated or increased, regardless of extenuating or aggravating circumstances.[74] Moreover, the fact that there were three codes violated the basic principle of codification since, considered as a whole, there was much repetition and overlapping.[75] On these grounds alone there was valid reason for amendment and consolidation. Unfortunately, these were not the only considerations advanced for recasting the penal law: as reaction set in under the Consulate, it was discovered that the majority of bench and bar were opposed to the revolutionary legislation and favoured ~~a~~ return to the old law.[76]

Hence, for these several reasons and as part of his plan to codify all French law, Napoleon, as First Consul, appointed a commission to consolidate and recodify the penal statutes and took part personally in the deliberations to this end.[77] He was at the height of his power as Emperor when the work was completed in two parts comprising a total of 1127 articles, as a code of criminal procedure in 1808 and a penal code in 1810. It is therefore no surprise to learn that the latter was an amalgam of reaction and reason, of old and new. Chief among its defects was that the relatively mild scale of punishments introduced in the codes of 1791 and 1795 were not only increased in severity, but that many of the ferocious punishments abolished during the Revolution--branding, mutilation, and confiscation, for example--were revived and many additional capital offences were created.[78] It is thus evident that, although the commissioners specifically endorsed the principle of deterrence and proclaimed it to be the foundation of the Code, they had modified the principle as enunciated by Beccaria[79] so that deterrence was to be brought about by the severity of punishment, rather than by its fairness and certainty; nor is there mention of rehabilitation, either explicitly or implicitly.[80]

On the other hand, the commissioners did introduce important progressive reforms and innovations: for example, they recognized the principle of extenuating circumstances by the introduction of pardons and the provision of maximum and minimum punishments for a specific offence. However, it is the technical aspect of this much imitated work which showed to best advantage, even though the commissioners were not original and used existing models for the Code's foundations.[81] Thus, like its immediate French and Germanic predecessors, the Code was divided into general and special parts, but each part was well defined and specific in content and thus did not overlap the other by tedious repetition, while each offence laid down in the special part was defined in clear, precise, non-technical language. In total, these subsumed all the substantive penal law, and it was specifically provided that offences could be punished only by penalties provided for by law prior to the commission of the offence. This enactment was the capstone of the Napoleonic codes, since the civil, commercial and procedural laws had been codified previously.[82]

With these examples before them and with the development of a national spirit among the hitherto fragmented German peoples, "there arose also the idea for a general legal code, for the entire nation,"[83] which received articulate formulation in a paper published in 1814 by Anton Thibaut, a professor of civil law at the University of Heidelberg.[84] However, his proposal was impossible to realize then and for fifty years thereafter, because of the continuing inability of the Germans to form a national government with effective authority to implement such a programme.[85] Moreover, even if there had been such a government, it probably would not have been able to make much headway initially against the storm of opposition to codification raised by Carl von Savigny, an eminent legal historian and jurist, who produced a detailed rebuttal of Thibaut's thesis, which was also published in 1814.[86]

In fact, Savigny's thesis is the beginning of the modern debate between advocates and opponents of codification since he adduced all the elements of the argument put forward by the latter from that time on. In particular, he took issue with the concept of natural law and argued that law was not abstract or immutable but arose in different forms according to the character of the different human societies in which it developed. Accordingly, it was, like national languages, constantly in a state of change and flux: to codify it would be to arrest its development and impose the law of the past on the people of the future. Finally, he claimed that, in any case, if codification were to come, it would be premature to carry it through at that time, because "the necessary historical knowledge and scientific studies were totally lacking; any code [illegible]t could then be made was bound to be erroneous and imperfect."[87]

While this rebuttal precipitated a spirited and long-running controversy between the eventually successful advocates of codification--at least in Germany--and their opponents, it also turned attention to the sources of German law, with great benefit to the civil and penal codes which were enacted subsequently by individual German states. While most of the latter were a close approximation to the indigenous code promulgated by Bavaria in 1813, other jurisdictions along the Rhine adopted or continued in force the Napoleonic legislation of 1810.[88] In particular, after a series of abortive attempts to draft a code from first principles, Prussia also enacted in 1851 legislation which was closely patterned on the current edition of the *Code pénal*, from which some of the more barbarous punishments had been eradicated.[89]

Thus, when the North German Federation was created in 1867 and a national government with real authority was formed under Prussian leadership, the groundwork had been laid to realize Thibaut's ideal of a code of national law. The cornerstone of the new legal edifice was laid with the promulgation of the 370 article Penal Code in 1870, which was in large measure a copy of the Prussian enactment of 1851 and was binding on all jurisdictions of the Federation.[90] Other areas of the law were also brought into line and, after the proclamation of the Empire in 1871, all of this legislation was raised to the status of Imperial law with no substantive change. The systematization of the penal law was completed in 1877 with the promulgation of the code of criminal procedure which included 474 articles. Unlike the French experience, however, the final instead of the first area to receive attention was the civil law, a process which began in 1874, with the eventual code being promulgated twenty-two years later in 1896.[91]

From first to last it is thus evident that the law on which the two major legal systems of Europe were based was in the form of enacted codes, from the Codex Euricianus of 470, through the epigrammatic coutumes of the medieval French provinces, to the detailed and rigorous compilations of the eighteenth-century monarchs and the post-Revolutionary legislation, and that these owed much to Roman legislation. For procedural law, the courts of France and Germany were equally indebted to Imperial practices, especially to the rule which forbade the use of precedent and enjoined the magistrate to rest his decision on the written law.

Invariably, this law and procedure were taught at the universities, and their graduates came to form the bench and bar in all secular courts. For these reasons, there were no great central tribunals in either country[92] where, instead, the supreme legal power was diffused through a number of high provincial or state courts of concurrent and equal jurisdiction. Finally, while the impetus for the codifications of the nineteenth century had arisen from a philosophical exercise concerned with the attempt to define a system of natural law, the penal codes enacted by France and Germany in the nineteenth century were not written from the first principles advocated by legal reformers and were, in fact, composites of old and new law. Thus, their resemblance to philosophical models was far more pronounced in matters of form than in matters of substance.

NOTES TO CHAPTER III

[1] Tacitus, Dialogus Agricola and Germania, trans. W. Hamilton-Fyfe (Oxford: Clarendon Press, 1908), pp. 89-119; see also Julius Caesar, War Commentaries, ed. and trans. J. Warrington (London: Dent, 1965), pp. 106-08.

[2] Munroe Smith, The Development of European Law (New York: Columbia University Press, 1928), p. xviii.

[3] General Survey, p. 13.

[4] Smith, Development, p. 117.

[5] Civil Law, Code, 1.1. - 1.12; see also General Survey, p. 88.

[6] General Survey, p. 6.

[7] The sources do not offer an explanation of why the codes were written in Latin; they state the fact and pass on to other matters: Smith, p. 96; General Survey, p. 6.

[8] Smith, Development, pp. 95-96; General Survey, p. 51.

[9] Smith, Development, p. 85; General Survey, p. 51.

[10] Smith, Development, p. 87; General Survey, pp. 18, 49.

[11] Smith, Development, pp. 88, 94.

[12] General Survey, pp. 18, 49.

[13] Smith, Development, p. 88.

[14] Smith, Development, p. xviii; General Survey, p. 51,

[15] General Survey, p. 47.

[16] Smith, Development, pp. 87, 88, 96, 120.

[17] Smith, Development, p. 120; General Survey, p. 46.

[18] Smith, Development, p. 121; General Survey, p. 71.

[19] Smith, Development, pp. 137-41.

[20] Ibid., p. 141.

[21] This was territorial law and was enforced only so far as the jurisdiction of the court extended. As such it should not be confused with the older personal law of the tribe, which bound a man no matter where he was located. General Survey, p. 78.

[22] Smith, *Development*, pp. 187-99.

[23] John W. Jones, *Historical Introduction to the Theory of Law* (Oxford: Clarendon Press, 1956), pp. 11-12.

[24] *General Survey*, pp. 708-17.

[25] Ibid., p. 115.

[26] Charles W. Previté-Orton, *The Shorter Cambridge Medieval History* (London: Cambridge University Press, 1955), I, 554 ff.

[27] Smith, *Development*, p. xxiii.

[28] Ibid., pp. xxiv, 258.

[29] Ibid., p. xxiv.

[30] See Wigmore, *Panorama*, pp. 992-93 for illustrations of glosses.

[31] *General Survey*, pp. 137-42.

[32] Ibid., p. 145.

[33] Ibid., p. 144.

[34] Ibid., p. 149.

[35] Quoted in Carleton K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press), p. 172. This is Allen's translation of Code, 7.45.13.

[36] Ibid., p. 161.

[37] Smith, *Development*, pp. 204, 281.

[38] Ibid., p. 204.

[39] Ibid., p. 281.

[40] Ibid., p. 262.

[41] Ibid., p. 272; *General Survey*, p. 206.

[42] Smith, *Development*, p. 272; *General Survey*, p. 208.

[43] *General Survey*, p. 261.

[44] The Hon. Mr. Justice Pigeon, late Justice of the Supreme Court of Canada, has copies of several such codes in his personal library which he very kindly allowed me to examine.

[45] Smith, *Development*, pp. 248-50.

[46] Ibid., p. 282.

[47] General Survey, pp. 359-61; Carl L. von Bar, A History of Continental Criminal Law, Vol. VI of The Continental Legal History Series (Boston: Little, Brown and Co., 1916), p. 207, hereafter cited as von Bar.

[48] Ibid., pp. 215-20.

[49] Smith, Development, p. 282.

[50] Hugo Grotius, The Rights of War and Peace, trans. W. Whewell (Cambridge, 1853), pp. xxx-xxxi.

[51] Ibid., p. 4: "Natural law is the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational nature has in it a moral turpitude or a moral necessity, and consequently that such act is forbidden or commanded by God the author of nature."

[52] General Survey, pp. 176-82; Lawson, Common Lawyer, p. 33.

[53] For this story see Frederick Pollock, "The History of the Law of Nations," Essays in the Law (London: Macmillan, 1922), pp. 31-81.

[54] Lawson, Common Lawyer, p. 33.

[55] General Survey, p. 182.

[56] These, it will be recalled, are epitomized by the Code of the Corpus Juris, a digest of all previous Roman law which had been classified, consolidated and arranged according to an arbitrary system, but not otherwise altered.

[57] General Survey, pp. 182-83. No code seems to meet these requirements. The closest to the ideal is the United States Constitution with its short, simple and generalized statements. Moreover, given its status as a fundamental document, whose provisions are beyond the reach of legislators, except by a long and complicated amendment formula, it is perhaps as close to an immutable statement of law as can be approached by human society.

[58] Although "retribution" is the conventional term used to describe the philosophical basis for punishment in the Continental legal systems from the early middle ages to the nineteenth century (von Bar, p. 398; I. Evans, "Punishment," New Catholic Encyclopedia, 1967 ed.), to use it thus is a perversion of the word and of the concept it denotes, i.e., a just and usually spiritual recompense or punishment exacted for an injury or wrong (OED; J.E. Fallon, "Retribution," New Catholic Encyclopedia, 1967 ed.). The actual basis for punishment was a cruel and usually arbitrary vengeance exacted by judges who held that their authority to award such punishments was derived from holy writ and other sacred writings, especially those of St. Augustine and St. Thomas Aquinas. In short, such magistrates saw themselves as God's agents on earth administering a species of divine, and therefore unrestricted, retribution. Their view is epitomized in the Thomist dictum that:

> One who exacts vengeance of the wicked in keeping with his own station does not arrogate to himself what is God's; rather he simply exercises a God-given power. St. Paul says of the earthly ruler, He is God's minister, an avenger to execute wrath upon him that doeth evil

(Summa Theologiae, trans. Dominican Order [New York: McGraw Hill, 1963], II-II, q. 108, a.1., answer and Note b.). Moreover, in addition to these divine and philosophical motivations, the tendency of the judges to hand down arbitrary judgements would be increased by their adherence to the provisions of the Corpus Juris which forbade the use of precedent. For an illuminating discussion of the philosophy of criminal law during this period, see von Bar, pp. 392-97; for illustrations of how cruel and arbitrary punishment was, see ibid., pp. 106-16; 229-36; 262-78, esp. 265; for a direct comparison with the previous Roman practice on which contemporary criminal procedure, or lack of it, was based, see Civil Law, Code 11.1.3 and essay at n. 1 to this article.

[59] For an overview of the specific contributions of these men to the cause of criminal law reform, see Leon Radzinowicz, A History of English Criminal Law (New York: Macmillan, 1948), I, 268-86. In the copious notes on these pages, Radzinowicz discusses much of the secondary literature on Continental law reformers, citing from primary sources to which he gives detailed bibliographical references.

[60] Wigmore, Panorama, p. 792; Pound, Jurisprudence, III, 690; Radzinowicz, HECL, I, 295-97.

[61] von Bar, p. 248.

[62] While the promulgation of these principles was an advance in the development of the criminal law, it is to be noted that they were not always followed in practice: see von Bar, p. 249. As to the severity of the punishments laid down in the Theresiana, see Radzinowicz, I, 291.

[63] von Bar,p. 249. For details of reform in other Germanic states see ibid., pp. 250-58; Radzinowicz, HECL, I, 286-300.

[64] von Bar, pp.248-49.

[65] General Survey, p. 436.

[66] Loc. cit.

[67] Ibid., p. 280; von Bar, p. 219.

[68] The arbitrary and cruel French penal law had remained virtually unchanged since the 1200s (von Bar, p. 259), excepting that procedure in criminal cases was regulated by an Ordinance of 1670. Chief among the reforms effected by the Assembly were that the judges lost their power to create offences and to award arbitrary punishments; i.e., to be a crime, an act had to be so designated prior to its commission, and for each crime there was to be a specific and statutory punishment (Art. 8 of the Déclaration des droits de l'homme du citoyen, cited in von Bar, p. 320). Further, religious offences were abolished (Art. 10) as were

guilt and punishment by association (Law of January 21, 1790). To mitigate the cruelty of the system, the punishments of branding, mutilation, life imprisonment, and confiscation of a convicted person's property were abolished: Ancel, French Penal Code, p. 9. Finally, the number of capital offences decreased from 115 to 32 and "all aggravated forms of the death penalty were abolished": Radzinowicz, HECL, I, 294.

[69] The Code of July 22, 1791 was concerned exclusively with délits et contraventions--misdemeanours and prohibited acts; that of October 6 with crimes--felonies: von Bar, p. 321. Thus, they encompassed all substantive penal law. Moreover, in a separate enactment, trial by jury was introduced in imitation of English practice: General Survey, p. 276; Ancel, p. 2.

[70] von Bar, pp. 320, 322. Deterrence had usually figured in medieval systems of punishment, but always as a beneficial side effect, never as a principal feature (see, for example, Summa Theologiae, I-II, q. 87, a. 3 ad. 2). In the latter part of the eighteenth century, however, men such as Beccaria and Bentham held that society must be protected from criminal acts by fair but certain punishments. This would ensure, on the one hand, that the offender would not repeat his crime and, on the other, that those who saw or heard of the punishment would thus not be tempted to imitate the offender. See von Bar, pp. 414, 430, 435 for an interpretation. For the original argument see Cesare Beccaria, Of Crimes and Punishments, trans. K. Foster and J. Grigson, in Alessandro Manzoni, The Column of Infamy (London: Oxford University Press, 1964), pp. 55-59, 96; and Bowring, Works, "Principles of Penal Law," I, 62, 396.

[71] For example, all offences were clearly defined, no "religious" offences were included, and mutilation as a punishment was abolished. von Bar, pp. 320-22; Ancel, p. 9.

[72] von Bar, pp. 321-22.

[73] The code of criminal procedure was unoriginal and except that it was the first such legislation to contain a consecutively numbered series of articles, it introduced no new concepts: von Bar, pp. 316, n. 4; 323.

[74] Ibid., p. 324.

[75] Ibid., pp. 321-33.

[76] Ibid., p. 336.

[77] Ibid., notes 4, 5.

[78] von Bar, p. 337; Ancel, p. 9. For a modern interpretation of this process, see Gordon Wright, Between the Guillotine and Liberty (Oxford: Oxford University Press, 1983), pp. 39-47.

[79] See n. 70 (above)

[80] von Bar, p. 337, n. 7.

[81] Ancel, *French Penal Code*, p. 11.

[82] *General Survey*, p. 292. Perhaps the most famous of the modern compilations, the *Code Napoleon* or, more correctly, the *Code civil*, was not a product of the Revolution, at least not in the same sense as were the earlier penal codes. It was drafted over a period of five years (1800-1804) by a committee of conservative judges and lawyers convened by Napoleon during a relatively calm period during those troubled times. The draft "consisted of thirty-six laws; these were voted and put into force, one after another, from March, 1803, to March, 1804" (ibid, p. 283). Finally, they were all incorporated in the "Civil Code of the French" which was enacted as law on March 21, 1804; ibid, p. 284. In respect of its content the commissioners were less original than those who drafted the *Code pénal*, for the largest part of the Code civil was either a verbatim copy or a paraphrase of old coutumes, and much of the remainder was made up from other material which antedated the Revolution: ibid., p. 286.

[83] Ibid., p. 441.

[84] Anton Thibaut, *Uber die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg, 1814).

[85] *General Survey*, p. 442.

[86] Friedrich K. von Savigny, *Of the Vocation of Our Age For Legislation and Jurisprudence*, trans. A. Hayward (1831; rpt. New York: Arno Press, 1975), p. 9.

[87] *General Survey*, p. 185; von Savigny, *Vocation*, especially pp. 24-30, 134-35, 152, 178-79.

[88] *General Survey*, p. 445; von Bar, p. 350.

[89] von Bar, pp. 350-51; Ancel, *French Penal Code*, p. 11.

[90] von Bar, p. 358.

[91] There had, of course, been previous federal codes, such as the famous customs and commercial compilations. But these were not valid in a state until ratified by the government of that jurisdiction. *General Survey*, pp. 445-46.

[92] But see the discussion on the evolving role of the French *Cour de Cassation* in *General Survey*, pp. 299-300. For later developments, see Sigmund Samuel, "The Codification of Law," *University of Toronto Law Journal*, 5 (1943-44), 149-51.

CHAPTER IV

After the legions left Britain in the fifth century, its shores were inundated by successive waves of invaders from the Continent. By the mid-sixth century they had eradicated most traces of Roman culture and the Latin tongue from the island.[1] From an evaluation of the scanty evidence of later times it would seem that, in common with other illiterate, tribal societies, the invaders had a rough system of justice which was mainly concerned with crimes of violence. The shape of their political and legal development would be comparable to that of Roman society in the period of the Monarchy or to that of the inhabitants of the Euphrates valley prior to the invention of writing.[2] Towards the close of the sixth century the record becomes clearer. In large part this is due to the preservation of several of the written lists of laws or "dooms" of the petty kings in England from that time on.

With the exception of the proclamation of Ine of Wessex, c. 675,[3] which specified, in part, that his dooms had been published "so that no ealdorman nor subject of ours may from henceforth pervert these our decrees,"[4] no specific reasons were given for reducing the customs of the early kingdoms to writing. However, other motivations may be inferred from a study of the texts and some of these, like the reasons advanced by Ine, will already be familiar to the reader. Perhaps the most important was the influence of the clerics who came to England from the nearby Frankish kingdoms of the Continent about the middle of the sixth century, as well as the Christianizing missions sent from Rome toward the close of the century.[5] These men, who came to wield great influence on their new regal converts, took sophisticated secular law codes for granted and, of course, had their own code of canon law.[6] On the one hand, no petty monarch could avoid being impressed by written registers which laid down the rules for Empire and Church, nor by the fact that barbarian monarchs on the Continent, with whom there were often close ties, had begun to follow this practice in the fifth century.[7] Nor, under ecclesiastical urging, would he fail to see himself as the first great lawgiver to his people, or be indifferent to the advantage of having his decrees made uniform in every part of his realm. Finally, the income to the crown from the pecuniary penalties set by the dooms would be considerable and simple to calculate.[8] On the other hand, while a cleric would certainly have been motivated by the desire for written uniformity, his desire to see the rights and prerogatives of the Church firmly entrenched in the dooms of the kingdom would in all probability have been stronger.

In the event, the first dooms of which there is record, those of Aethelberht of Kent, c. 575-600, would presumably have satisfied both king and cleric, in the form in which they have come down to us.[9] In style they are elementary, even primitive, while they hark back in content to the very beginnings of law in other civilizations.[10] Thus, unlike the Continental codes, the collection appears to be an indigenous product, uninfluenced by Roman or even Frankish practice.[11] Moreover, it is unique in that it was written in Anglo-Saxon or Old English, which by that time had wholly displaced Latin and Celtic and was thus the vernacular tongue of England.[12] This would appear to demonstrate that it was to be law for the whole population, not just for a particular group as was the Continental practice. After the preamble and the first (ecclesiastical) section of the collection, both of which Richardson and Sayles have demonstrated to be spurious,[13] a few provisions relating to the family and to property are interspersed between sections which, in total, comprise an elaborate schedule of pecuniary penalties for specific acts of violence.[14]

As the petty kingdoms were reduced over the following centuries, monarchs and councils of the larger, succeeding aggregations issued codes.[15] These improved on Aethelberht's Dooms by broadening the jurisdiction to include such matters as the sale of goods, military service, family law and administrative procedure, while amending the penal provisions to form a more reasonable proportion of the whole.[16] Furthermore, in the last code promulgated before 1066, that of Canute, c. 1030, there appeared the first set of what later became known as "pleas of the crown," or matters over which the monarch claimed exclusive jurisdiction including, inter alia, breaches of the king's peace, which drew corporal or pecuniary punishments.[17]

Supplemented and extended by the local customary and unwritten law, the dooms were interpreted and applied principally by omnicompetent administrative and judicial tribunals which came to be known as county courts. In the early days of these institutions, each court was presided over by a joint bench consisting of the local nobleman and a dignitary of the church; eventually the joint bench was replaced by the king's personal representative in the county, the sheriff.[18] Hence, by the time Canute's Dooms were promulgated, England had become a centralized and united kingdom with a settled system of courts and a growing body of codified national law in which a separation between penal and other provisions was dimly visible. By now, the courts included not only the county, but also inferior local courts known as "hundreds," which were presided over by the sheriff's deputy, the bailiff.

On reflection, it is evident that this situation is contrasted strongly with contemporary conditions on the Continent: Charlemagne's centralized empire had long since disintegrated into a plethora of hostile principalities, duchies and lesser honours, and in many of these law had regressed to the point where it was not only local and particular, but was unwritten.

It is evident, too, that Duke William of Normandy knew and approved of the codified national law of his Anglo-Saxon predecessors, because he specified on several occasions that the laws of Edward the Confessor[19] were to remain in effect for all his subjects, and he made few substantive additions to them during his reign.[20] His Norman successors tended to follow his lead in this respect; hence, there were several reconfirmations of the laws of the Confessor but few substantive changes made to them during the century following the Conquest.[21] On the other hand, some of the institutional changes made by the Conqueror had unforeseen ramifications for the development of the English legal system, in criminal law especially. Prime among these was the introduction of the Norman system of landholding and feudal courts to adjudicate questions of tenure. Of major importance also was the separation of the secular from the spiritual jurisdiction, which was brought about by a decree specifying that church dignitaries should no longer exercise joint authority in the local courts, but should set up separate tribunals in which to hold ecclesiastical pleas.[22] The latter development, together with the fact that the authority of the local

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nobility had been on the wane for some time, came to ensure the virtual dominance of the county courts by the sheriffs late in the eleventh century.[23]

The enhanced authority of the sheriff thus became a serious problem for the crown and various expedients were tried to keep it within manageable proportions. Of first importance among these was the rigidly enforced practice of requiring the sheriff to account semi-annually for the royal revenues of the county in the nascent Exchequer which, in turn, greatly encouraged the development of this institution, the first of the common law courts.[24] Another expedient was to limit the sheriff's jurisdiction as presiding officer in county tribunals. At first this was done by appointing a permanent justiciar to preside in the sheriff's place. This experiment did not last long and was replaced by a system whereby itinerant justices, later known as justices of assize, were sent out from the king's court to sit in judgement on pleas brought under the criminal and petty assizes, which were enacted early in the reign of Henry II.[25] Finally, pleas of the crown, which had greatly increased in number from the time of Canute,[26] were removed entirely from the sheriff's jurisdiction by Magna Carta.[27] This development, together with increased land litigation which was transferred from feudal to royal courts by writs developed to supplement the petty assizes,[28] gave added impetus to the rise of the other two common law courts in Henry III's reign: those of Common Pleas and King's Bench. Thus these two tribunals grew and gained jurisdiction at the expense of the local and feudal courts and eventually became located in Westminster Hall, together with the Exchequer.

Initially, the benches of all three courts were appointed from clerics learned in the civil and canon law, who staffed the Exchequer, Chancery or other branches of the incipient civil service.[29] However, towards the end of the thirteenth century, the benches came to be occupied by lay judges selected from a small, closed profession, who had little academic learning and who were trained empirically. In part, this came about because the teaching of civil law had been forbidden in London, the seat of the courts, in 1234.[30] Subsequently, it became clear that there were two routes to eminence in the legal profession: a student could follow the traditional practice and study civil and canon law at Oxford or Cambridge, or he could learn the law by observing the courts at work in Westminster Hall. For the man who was eager to advance rapidly, there were serious drawbacks to the first alternative. To begin with, the study would be wholly academic since the universities were in rural backwaters where there would be no chance to study the royal courts in action. More importantly, however, such training would not prepare the student to enter the profession immediately, because it was by then very evident that the English legal system was not patterned on civil law practices, but was actually diverging farther from them in every term.[31] In addition to these considerations, there was for those who wished to be ordained or to receive ecclesiastical preferment the further disadvantage that, from early in the twelfth century, the Church actively discouraged the clergy from learning the civil law and from becoming involved with the secular courts.[32]

On the other hand, if the eager aspirant became an apprentice to one of the recognized legal experts--a pleader or narrator in the royal courts--he would be able to learn the requisite administrative procedures from his master and the substantive work of the profession by attendance at Westminster Hall.[33] In this way he would derive the immeasurable advantage of not only knowing what the latest judgements were in any given branch of the law, but also of having heard the arguments on which they were based. But there was a grave disadvantage to this empirical approach, albeit one that was not so obvious. In by-passing the university, the student had little opportunity or incentive to rub shoulders with those in other academic disciplines, or to become acquainted with other legal systems and, as a consequence, did not acquire the academic learning and the wide breadth of vision which characterized the clerical members of the legal profession.[34] Nevertheless, the empirical approach was the more appealing and in the last half of the thirteenth century, many students took this route to the profession and soon came to form a centralized lay bar, skilled in the developing common law.

It is most probable that the availability of this able and ambitious group and their obvious suitability for legal preferment were prime reasons for Edward I to develop the practice, which still obtains, of raising the most eminent practitioners--the later barristers[35]--to the bench, in preference to learned clerics who had risen through the ranks of the civil service.[36] The final element of the closed legal system, which has been perpetuated in England to this day was put in place in 1292, when a royal writ directed the Chief Justice of Common Pleas to limit the number of apprentices and attorneys--the later solicitors[37]--allowed to practice before the Court.[38] In effect, this writ put the bench in charge of legal education, since it gave them the power, later delegated to the Inns of Court, to set standards which an aspirant had to meet before he was admitted to the bar.[39] But while the now largely lay bench thus influenced the development of the bar, that "small, vigilant body of pleaders with long memories and ready tongues"[40] exerted a reciprocal influence on the judges. For in order to make reasonably accurate predictions to their clients, barristers and attorneys required a degree of certainty and stability in the decisions of the bench; consequently, they persistently assailed the bench with "protest[s] that decisions ought to be consistent and that settled courses of practice ought not to be disturbed."[41] Here, then, were the first glimmerings of what later was to develop into the doctrine of precedent.[42]

In turn, it would seem that all these thirteenth-century developments were major causes of another contemporary and significant development concerning the form of enacted law. It will be recalled that the Anglo-Saxon monarchs had legislated in the form of written codes, and that the Normans continued this tradition in that they proclaimed the code of Edward the Confessor to be in effect during their reigns, which did not produce many substantive additions to the written law. But this situation changed with the accession of the Angevins to the English throne. Beginning with Henry II, the Angevins increased enormously the use of variously named enactments--_carta_, _assisia_, _constitutio_, _proviso_, _ordinato_, _statuto_, and more[43]--to bring about sweeping changes in English law. Regardless of the names however, a study of this legislation shows that it divides roughly into two forms: codified enactments, which continued the traditional style, and instruments which today would be termed "statutes." The former were enactments composed of short, disparate, and general chapters which encoded all the law of the jurisdiction, or a main branch of it in a more or less systematized form. The latter were legislative instruments, often containing more than one section, which provided a comprehensive and detailed treatment of a single and specific topic. For example, the Assizes of Clarendon and Northampton[44] enacted by Henry II comprise, in effect, a code of criminal procedure. Similarly, the instrument imposed on King John by the barons in 1215, in sixty-three disparate chapters, known as Magna Charta[45] is, in fact, a code of constitutional law, at least for the king's great subjects. But perhaps the best example of an exhaustive code is the Statute of Wales, in which Edward I reformulated and codified the previous Welsh civil law and substituted English for Welsh criminal law.[46] On the other hand, parliaments often turned their attention to single issues and legislated to meet these narrow needs. Thus, the Statute of Mortmain[47] forbids alienation of lands to the Church, while the Statute of Merchants[48] lays down the regulations governing collection of debts, and the Statute of Assizes and Juries[49] specifies the qualifications required by persons selected for jury duty. Suddenly, however, the former practice fell into disuse during the last years of Edward I and it became the custom to follow the latter practice exclusively: that is, to confine to a specific topic the provisions of a legislative enactment, which then became a substantive fragment of the undifferentiated and uncodified mass of statute law. As in Roman times, such fragments soon became a bulky and unmanageable collection. In the three hundred-year interval between the calling of the first parliaments and the death of Henry VIII, two thousand enactments were given royal assent; by 1855, three hundred years later, the number had swollen to nearly sixteen thousand.[50]

From the thirteenth century on, all such enactments were copied and preserved on the Statute Rolls. With the advent of printing late in the fifteenth century it became customary to print each act assented to in the volume of statutes published after each legislative session.[51] It thus formed a numbered chapter in a collection of unrelated matters, and was generally a brief and uncomplicated piece of prose--a short chapter of one sentence. The petition or bill which formed its substance became a statute by virtue of the enacting formula with which it opened.[52] At about the time the sessional volumes began to be issued, these words had assumed substantially the same form they have today:

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows.

If the statute was divided into two or more parts, each consisted of one sentence and became a section of the chapter. The long form of enacting words was always included in the first section. But the first phrase of those words, "be it enacted," or words of similar import was the first phrase of every succeeding section in order to extend the coverage of the formula to their provisions. For a variety of reasons the texts became "long, full of enumerations, exceptions, provisions, saving clauses and the like."[53] But they could not be punctuated by a period, unless it was followed by enacting words, because the coverage of the formula stopped with the period. Hence by the eighteenth century a statute consisted of one or more interminably long sentences without any internal subdivisions such as subsections or independent clauses. A typical example is section one of the Quebec Act, a sentence of 597 words.[54]

Since this form of legislation became a characteristic of the English constitutional and legal systems and thus one of the elements which caused them to diverge from those jurisdictions which were evolving in the civil law tradition, it would be desirable to know why the change occurred. Until the question can be examined more intensively, the following hypothesis is all that can be offered.

From the time of the first parliaments late in the reign of Henry III, royal judges who had been raised to the bench from the professional element of the curia regis were employed to draft legislation which was to be introduced by the "government."[55] In early days, most if not all such men were clerics with cosmopolitan views and considerable learning, who had been educated in the civil and canon law and who were thus familiar with codified formats. Since they were also trained administrators who would know the value of organization and compression, it is not unreasonable to assume that they would tend to follow the traditional patterns of both church and state, and draft legislation in codified form. This would account for the codified format of much of the legislation enacted between the last years of Henry III and the close of the thirteenth century.

On the other hand, in addition to drafting legislation to implement government policy, judges, acting in their capacity as royal counsellors, were also in the majority on the parliamentary tribunals of "receivers" who sifted and adjudicated petitions to the Crown, a practice which evidently also began in the first parliaments.[56] When such requests were within their jurisdiction, the receivers gave an immediate decision. But when a remedy was beyond their authority, they forwarded the petition to the appropriate quarter,[57] often, no doubt, with suggestions for its disposal. In effect, it became a first draft of enabling legislation, private or public, if such remedy were thought appropriate. While this practice did not become systematized until the middle years of the fourteenth century, it would appear that it began in the Parliaments of Edward I, albeit in a crude and tentative form.[58] Hence, it may well be that this procedure was in some part responsible for the origins of the single-item statute.[59]

While these are plausible explanations for the mixture of codified legislation and single-item statutes characteristic of much of the reign of the first Edward, they do not address the central question: why did the latter then supplant codes? The answer, it is suggested, lies in the radical change in the character of the bench between about 1260 and the end of the century.

As we have seen, clerics, who were also professional administrators, were largely replaced on the bench by pleaders or narrators, who had been empirically educated in the new and developing common law and thus had been trained to deal thoroughly and in detail with narrow issues, and to be guided by custom and precedent in the formulation of their judgements. When, in turn, these men took up their duties as legislative draftsmen, they would have been unlikely to have had the same interest in the bureaucratic administration of the law as a civil servant, nor would they have been as familiar with or as receptive to the concept of codified law as their clerical predecessors. On the contrary, it is probable that their experience and training tended to prejudice them against the universality of a code, with its short, pithy and sweeping generalizations. Rather, the tendency would be to view the business of parliaments as a series of specific, narrow and pressing issues, each to be dealt with by drafting precise and detailed legislation to solve the specific problem.[60]

If this is a correct reading of the situation, then it is probable that the judicial draftsmen would have been encouraged in their preference by a change in parliamentary administrators which occurred about 1290. Prior to that year and from the time of the earliest Parliaments of Edward I onwards, the man who performed the functions of the official who would later be known as the clerk of parliament was the Archdeacon of Coventry, John Kirkby.[61] In addition to such duties he was also Clerk of the Council, "keeper of the rolls of chancery . . . and, by courtesy at all events, vice chancellor"--in all, a man of great authority and influence.[62] As such he would probably have been the individual who was charged with implementing the policy of his monarch to codify English law "after the manner of the Institutes."[63] A considerable start was made on this project by the compilation of the treatise now known as Britton, which was probably completed about 1291-92.[64] Before its completion, however, Kirkby died during a violent attack of fever early in 1290.[65] He was succeeded in his parliamentary duties by Gilbert of Rothbury, a common lawyer with no known experience in bureaucratic government.[66] If Rothbury was of the same mind as his judicial brethren, then this powerful combination may account for the preponderance of single-item enactments during the remainder of the reign and for the two facts that Britton never became statute law and that Edward's contemplated codification of Scottish law in 1305 was stillborn.[67]

Another consequence of this narrow and empirical approach to the formulation of statute law is that it could only have encouraged the development of judicial legislation. In the changing social and economic conditions, the bench would be forced to make decisions in areas where there was no enacted law to guide them and then to utilize the custom or precedent thus established to settle future cases. In this respect the contrast with the civil law jurisdictions was at its most marked: on the Continent, bench and bar had in the Corpus Juris a compendium of law at hand "which answered the problems of a more advanced civilization than any that succeeded it until late in the eighteenth century,"[68] whereas the English had to enact a remedy for a new problem, or to arrive at one by judicial legislation.

In the absence of definitive evidence, such matters must remain items for informed speculation. What is not in doubt, however, is the fact that during the formative years of parliament the judiciary, clerical at first and then increasingly lay, were most influential in establishing the procedure to enact legislation and in defining the form of such legislation.[69] Thereafter, while their influence declined as parliament became more a political than a judicial forum during the fourteenth century, the English statutes remained in the mold in which the judiciary had cast them. As this was the period when agitation for the reception of the codified law was increasing in the fragmentary states of the Continent, it will be apparent how English constitutional and legal thought and practice had diverged from jurisdictions across the Channel. Nowhere was this more in evidence than in the criminal law and procedure, in which many Continental practices were modified to suit prevailing conditions and merged with existing English law and procedure.[70]

When William I introduced feudal courts to England after the

Conquest, the fundamental basis for their jurisdiction was the land of the realm and the relationships which arose when it was subdivided.[71] Such a relationship would occur typically when a man-at-arms exchanged the use of his sword for a grant of land from the king or lesser lord, and pledged his agreement to the compact in a solemn act of homage to his superior. Thus, the most heinous offence in the feudal lexicon was the crime of felony, or breach of the bond of homage. Accordingly, in a punishment to fit the crime, a felon's real property escheated or reverted to his lord, while his chattels were forfeited to the king, regardless of whatever additional penalties he incurred.[72] However, over the years, and possibly because of the engrossment of litigation over real property by the common law courts at Westminster, "felony" lost all but one of its feudal characteristics and became the generic term which designated the most serious crimes comprehended under pleas of the crown: "all the hatred and contempt which are behind the word felon are enlisted against the criminal, murderer, robber, thief without reference to any breach of the bond of homage and fealty."[73] As a result of this development, the punishment of death, which soon became mandatory for such felonies, was augmented and made more awful for the felon's survivors by including as an essential element the feudal punishment of escheat and forfeiture.[74]

In Norman times, a criminal action began with an "appeal" of felony in which A accused B of some felonious act, in the appropriate court of jurisdiction. After the troubled times of King Stephen's reign and in the absence of any municipal or local law enforcement body other than the tithing, this system of private accusation was evidently not effective in bringing a majority of offenders to book.[75] Hence, in the

Assize of Clarendon (1166), Henry II gave regal authority to an alternative procedure, communal accusation, by making statutory an administrative institution of some antiquity.[76] This was the sworn inquest or "jury of presentment," the precursor of the modern grand jury and an adaptation of an earlier Frankish administrative procedure (discussed above).[77] It was convened by swearing in twelve or more "lawful men" of the county as a panel of inquisitors.[78] Their function was to name the persons of their jurisdiction who, by common repute, were suspected of having committed felonies and to "present" the information to the royal judiciary: the sheriff or itinerant justice, as the case might be.[79] This institution did not operate in a vacuum but was an intrinsic part of the administrative and judicial system of the time. As such, its duties were not limited to pointing the finger at suspected felons, but also included investigating many other aspects of life at first hand, as required by the justices; in short, it performed many of the functions now carried out by local governments.[80] Collectively, its answers to the bench were known as "presentments." The inquisitors, for example, "presented" to the judges that A, the keeper of the measures, needed a new set of scales, or that B needed assistance to enforce the Assize of Wine.[81]

But the presentments of crime--felonies and other lesser offences--also came to be known, by Bracton's time at least (c. 1250), as "indictments," probably because the inquisitors were retailing the suspicions of the neighbourhood rather than reporting knowledge gained at first hand.[82] This special variety of presentment may have been delivered orally at first, but it was probably reduced to writing early in the thirteenth century and the practice was made statutory in 1285.[83]

As the grand jury assumed its definitive form in the fourteenth century, so the written presentment of a criminal offence assumed the familiar form of a bill of indictment which, if the grand jury assented to it, became a "true bill."[84] Regardless of how the suspected persons were accused, their cases were adjudicated by one of the several ordeals, which were the recognized methods of trial until 1215.[85] But cases ceased to be so decided in that year, because Innocent III "forbade the clergy from performing any religious ceremonies in connection with the ordeals,"[86] which caused the royal bureaucracy and bench to cast about for a new method of trial to replace the ordeals. It was found in yet another adaptation of the sworn inquest which, over the next one hundred and fifty years, evolved into the criminal or petty jury,[87] that is to say, twelve men sitting as judges of fact who gave a verdict on the basis of evidence presented before them in what approximated a crude version of a modern trial.[88]

As we have seen, prosecutions for lesser offences--trespasses,[89] as they were first known--also came to be initiated by indictment.[90] Furthermore, by the final years of the thirteenth century, the trial also took place before a jury.[91] Hence, in these two particulars, procedure for trespass resembled that for felony. But in other respects the differences between the two were substantial and were the outcome of a peculiar historical development.[92] Originally, the action of trespass evolved as a remedy for both civil and criminal wrongs, for it could be brought on by A suing B for some infringement of A's right or by an inquest of presentment. Its resolution could involve an award of damages to A and a fine or imprisonment, or both, for B.[93] In the course of time, however, and by a branching process, one branch from this common trunk developed into the civil trespass or tort, brought on by a wronged plaintiff who prayed for damages, while the criminal trespass eventually became known as a "misdemeanour" and was brought on by an indictment.[94] But, because the development of trial procedure for these lesser crimes had been inextricably bound up with that evolved to try civil wrongs,

> a prosecution for misdemeanour is [c. 1890] hardly distinguishable from an action in which the king is plaintiff and which aims at punishment and not at damages. Thus in a trial for misdemeanour, the juryman's oath is to "truly try the issue joined between our sovereign Lord the King and the defendant." But in a felony it is to "true deliverence make between our sovereign Lord the King and the prisoner at the bar."[95]

Moreover, it came to be the rule that, while the "prisoner at the bar" was, in modern terms, required to be in the dock for the whole of his trial, the defendant in a case of misdemeanour was allowed to sit at the table of the court.[96] Thus, when it is recalled that a felon's punishment was forfeiture and death whereas, in the main, only fines and imprisonment were visited upon the misdemeanant, it is evident that by the fourteenth century, the common law had developed lines of demarcation between felonies and criminal trespasses which were distinct and meaningful.[97] But while some advance had thus been made in terminology and procedure, the number of criminal offences at common law remained few and virtually unchanged.[98]

In all probability this was due, in large part, to the fact that the common law courts concerned themselves almost exclusively with the land law and its ramifications.[99] Nevertheless, as political and economic conditions changed, so it became both necessary and possible to extend and make changes in the criminal law.[100] For the most part, this was accomplished by the Crown through the process of enacting statutes which created specific new felonies and misdemeanours. These were dealt with in the same way as offences at common law: by indictment and jury trial.[101] For example, coming armed before the justices became a criminal trespass in 1328,[102] as did the forging of deeds in 1413,[103] while in 1363 it was made a felony to steal a hawk,[104] and, in 1439, to desert from the army.[105]

Long before these developments the large number of cases brought on by Henry II's reforms had become too great a burden for the itinerant justices to handle alone, particularly after the sheriff had been barred from hearing pleas of the crown in 1215. Various expedients were tried to solve the problem and eventually a system was worked out whereby the Justices of Assize held the serious and weighty pleas during their periodic perambulations of the circuit, while local men of substance were commissioned as justices of the peace[106] to deal with routine and petty pleas. Their authority was greatly increased in 1361, when they were also given statutory authority "to hear and determine, at the king's suit, all manner of felonies and trespasses committed in the same county."[107] Ever since that time the justice of the peace has been the workhorse of the English judicial system and his duties are continually increased by statute.

One of the most significant of these was Henry VII's Act of 1495 against unlawful assemblies and other offences. It gave express authority for offenders who committed any statutory trespass to be tried summarily, that is, without the intervention of a jury, and for such trial to be brought on by an information laid before the justice of the peace rather than by an indictment.[108] Such a sweeping measure was deservedly unpopular and was repealed on the accession of Henry VIII.[109] But it had paved the way for change, and soon

> new statutes were made embodying the principle, and became very common under the Restoration, dealing with a vast number of petty offences. By 1776 a leading practice book devoted nearly two thousand pages to the offences triable by this procedure.[110]

One reason for this proliferation of words was that in each such statute it became customary to specify a single offence, to detail the procedure for the disposal of a case, and to lay down punishments which might be a small fine, a short period of imprisonment, a minor corporal punishment, or a combination of all of these.[111] In most instances it was laid down that the case was to begin with a complaint or information by the accuser directly to the justice of the peace. In other words, each offence had its own procedure, although most such statutes had common features.[112]

As legislation setting up summary conviction offences[113] continued to proliferate and to introduce yet more variations in the practice of the justice of the peace, the situation obviously became increasingly confusing.[114] Eventually, a measure of uniformity in procedure was introduced in 1822 by the enactment of a statutory form by means of which summary convictions were to be recorded.[115] But this was not sufficient to resolve the confusion. That was not accomplished until 1848 when the long and comprehensive Summary Jurisdiction Act[116] regularized the general procedure. In part, it defined the jurisdiction of the justice of the peace, specified that process was to begin with an information or complaint laid before the justice, detailed the procedure to be followed to bring the offender before the bench and in any subsequent trial, and laid down maximum punishments. Thereafter, several statutes enlarged and amended this Act,[117] but it had set the pattern. However, it should be made clear that while the justices now had, in effect, a manual of general procedure, they still had to refer to the enactment which defined an offence to see if a special procedure was indicated, so that they could be certain that they had jurisdiction to try the accused and that his action had been in violation of the statute.[118]

Meanwhile, the few capital offences of early English law received spectacular augmentation during the eighteenth century. Leon Radzinowicz estimates that there were over two hundred capital statutes in force by 1800.[119] But many of these enactments created multiple crimes so that there were, in fact, over one thousand felonious offences, with two hundred or more being defined in one statute alone: the infamous Waltham Black Act of 1722.[120] In addition, there had been a similar increase in the number of misdemeanours promulgated by the legislature.[121] But in contrast to this enormous augmentation of the substantive law, the punishments and other incidents which set felonies apart from misdemeanours remained virtually as they had been when these classifications were first developed.[122] In particular, it will be recalled that the former were punishable by death and forfeiture and the latter by fine or imprisonment.

Early in the nineteenth century, however, this situation began to change as a result of a reform movement which had begun to gather force in the last decades of the previous century. In part, the movement had been caused by the intellectual ferment across the Channel, but even more so by the arguments of Jeremy Bentham,[123] William Blackstone[124] and others,[125] who had been influenced by the writings of Continental legalists, particularly by those of Cesare Beccaria. Over the next seventy years their appeals to public opinion and Parliament caused the repeal of much criminal legislation and the passage of a considerable number of disparate amending statutes which effected a vast reform in criminal punishments. To begin with, all aggravated forms of the death penalty were abolished by 1834.[126] Reducing the number of capital offences was a slower process for, although it began in the early years of the century, it was not until 1861 that the death penalty was abolished for all but four felonies: treason (the "great felony"), murder, piracy, and arson in dockyards.[127] Finally, in 1870, forfeiture of lands and goods on conviction of felony was abolished.[128]

All of this was real, substantive progress and greatly to be desired. But the piecemeal approach of the legislature and the fact that it did not reclassify a felonious offence as a misdemeanour, when the statutory penalty was mitigated to a punishment less than death on conviction, eroded the essential distinction between the two types of offence to the point not only of confusion, but also of meaninglessness. That is to say, except for the four capital offences, all felonies now drew exactly the same kinds of penalties as misdemeanours. However, if a felony was punished by a maximum term of imprisonment, the term was frequently less than it was for many misdemeanours. But perhaps an even greater anomaly was the fact that the other incidents which had attached to each class of crime over the years preserved the old distinction.

For example, as late as 1904, a person charged with stealing mineral ores such as coal, a felony punishable by a maximum of two years' imprisonment,[129] was required to stand trial in the dock. If convicted and sentenced to hard labour, he was forbidden to vote, sit in

Parliament, or hold civil, military or ecclesiastical office while under sentence, and he lost any governmental pension to which he was otherwise entitled.[130] On the other hand, if charged, convicted and sentenced for committing the misdemeanour of conspiracy to murder, punishable by a maximum of ten years' imprisonment,[131] the accused was allowed to sit beside his lawyer within the bar during his trial, was not subject to any civil penalties, and did not lose his pension.[132]

These are but two examples of the many which could be cited. In his Digest of the Criminal Law (1904), Sir James Fitzjames Stephen discusses 191 felonies and 231 misdemeanours which had been defined in the common law or which were scattered through sixty-seven statutes promulgated over the previous five hundred years.[133] When it is considered that these were by no means exhaustive lists of either offences or statutes,[134] it is evident that the incidents pertaining to indictable offences constituted a tangled and confusing thicket of ancient and modern practices and punishments.

In terms of criminal procedure, the situation was similar in the early nineteenth century. As with summary conviction offences, the increase in the number of statutory felonies and misdemeanours had also caused a confusing proliferation of special provisions associated with such crimes.[135] The remedy for the problem was the Indictable Offences Act, 1848[136] which, in part, laid down a standard procedure for the adjudication of indictable offences. In particular, the Act greatly amplified and re-enacted a provision of long standing[137] by which a justice of the peace was authorized to conduct a preliminary hearing of evidence relating to a crime, and to commit an accused person for trial if a prima facie case was thereby made out against him.[138] The process began with the laying of an information, which could be done by a private person or, in the majority of cases by that time, by a law officer.[139] During the examination, at which accused and accuser were required to be present, evidence from both sides was heard and tested, and a decision was made on the basis of the facts thus adduced.[140] So far, it was a rational and reasonable process. But then the magistrate was required to deliver all writs, depositions, and other documents to a superior court where they were used to draw up a bill of indictment for the grand jury.[141] This heterogeneous body of local residents sat in closed session and made their decision whether or not to find a true bill on the basis of statements made by the prosecutor and the witnesses who supported the accusations. The jurors never saw either the defendant or his witnesses.

Clearly, the grand jury and its whole process were holdovers from the first days of the inquisition of presentment in the twelfth century. From at least the mid-1800s onwards, the institution drew the ire of a large and articulate section of the population, whose objections to it were eloquently summarized by Courtney Kenny:

> [T]he sole function of a modern grand jury is to repeat badly what has already been done well:-to hear in secret, imperfectly, and in the absence of the accused, one side of the case, after both sides of it have already been heard fully, in open court, and with the full opportunity of legal aid. A bad tribunal is laboriously brought together, in order to revise the work of a better one.[142]

But these do not begin to exhaust the anomalies: the Act did not abrogate the right of any person to lay a bill of indictment directly before a grand jury, even when the information on which it was based had been found wanting by a magistrate.[143] Hence, a person could be accused of a crime in this manner and discover the fact only after the grand jury had found a true bill. His only information would be the indictment itself, which would not show the name of his accuser or specify what evidence he would have to refute.[144] Hence, it would seem that the grand jury was a redundant and occasionally injurious institution, in terms of criminal law. But in terms of its civil responsibilities the grand jury was in no better case, for while the reform of penal law and procedure was in progress, the government had been busy in other areas too, and not the least in setting up a workable system of local government. In many cases the resulting bodies either were given or assumed many of the functions hitherto performed by the grand juries.[145] For all these reasons then, the grand jury, which some wag termed "the fifth wheel on the judicial coach,"[146] was the source of frequent and bitter controversy and many attempts were made to legislate it out of existence, all to no avail.[147]

In a sense, the survival of the grand jury and its inclusion in the otherwise rational procedure of the Indictable Offences Act epitomized the condition of English penal law at the end of the nineteenth century. Much progressive substantive reform was marred and obscured by archaic and confusing survivals from the period when the legal system began to assume its characteristic form in the twelfth and thirteenth centuries. Not the least of these was the parliamentary penchant for legislating to meet single, narrow issues, and usually only when forced by the pressure of events to do so. In large measure, this had caused the penal law to become a composite of separate and unrelated statutes without any coherent or unifying form, and the vague and diffuse judicial legislation enforced by applying the doctrine of precedent.

The guides through this legal maze were (and still are) a small, highly skilled group of legal experts: the barristers. These men not only advised clients and litigated their causes, but they also controlled the narrow and insular system of legal education at the Inns of Court and provided the able and seasoned personnel who staffed the benches of all the superior courts. As in medieval days, these were still located in London from whence, at due periods, bench and bar perambulated their appointed circuits to administer justice in accordance with the increasingly cumbrous bulk of English law. Apart from this proliferation, little else had changed in five hundred years, with the large exception that the substantive penal law had been extensively and progressively reformed. Thus, in contrast to the earlier French and German experiences, which had caused the development of their penal codes, there had been much more change in matters of substance than in matters of form in English criminal law.

NOTES TO CHAPTER IV

[1] Robin G. Collingwood, Roman Britain and the English Settlements, 2nd ed. (Oxford: Clarendon Press, 1937), pp. 451-6.

[2] Diamond, Primitive Law, p. 12.

[3] Frederick L. Attenborough, ed. and trans., The Laws of the Earliest English Kings (1922; rpt. New York: Russell & Russell, 1963), p. 34.

[4] Ibid., p. 37.

[5] Henry G. Richardson and George O. Sayles, Law and Legislation From Aethelberht to Magna Carta (Edinburgh: University Press, 1966), p. 157.

[6] Frederick Pollock and Frederic W. Maitland, The History of English Law Before the Time of Edward I (1898; rpt. Cambridge: Cambridge University Press, 1978), I, 11; hereafter cited as P&M.

[7] Richardson and Sayles, Law and Legislation, pp. 1, 8, 157.

[8] Ibid., p. 5.

[9] Ibid., p. 9.

[10] Diamond, Primitive Law, p. 31.

[11] Richardson and Sayles, Law and Legislation, p. 1.

[12] So far as can be ascertained, Aethelberht's Code is the first Germanic collection to be published in the vernacular. P&M, I, 11.

[13] Richardson and Sayles, Law and Legislation, pp. 1-8.

[14] Attenborough, King's Laws, pp. 5-17.

[15] Ibid., 18, 24, 26, 62, 114 and 122. Agnes J. Robertson, ed. and trans. The Laws of the Kings of England From Edmund to Henry I (Cambridge: Cambridge University Press, 1925), pp. 1, 45, 135. See also Sir James F. Stephen who says in part: "These different bodies of law vary...but, speaking generally, they re-enact each other. and may be regarded in the light of so many new editions of a single very imperfect code...." A General View of the Criminal Law of England, 2nd ed. (London: Macmillan, 1890), p.6.

[16] See, for example, Robertson, King's Laws, pp. 154-2[illegible].

[17] Ibid., p. 181, ss. 12, 14, 15. See also Albert K.R. Kiralfy, ed., Potter's Historical Introduction to English Law (London: Sweet &

Maxwell, 1968), p. 350, for a discussion of the derivation of the term "pleas of the crown." But see also Theodore F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956), pp. 421-3, who makes it clear that in medieval times pleas of the crown were not exclusively criminal, becoming so only in later times.

[18] Frank M. Stenton, *Anglo-Saxon England*, 3rd. ed. (Oxford: Clarendon Press, 1971), pp. 547-8.

[19] In fact, no laws of the Confessor have come down to us, but that there must have been such a compilation is evident from the fact that it is mentioned so frequently in the sources. See, for example, Robertson, *King's Laws*, pp. 231, 241, and the discussion in P&M, I, 97, 103. Richardson and Sayles, however, are not persuaded that there was such a compilation. See *Law and Legislation*, p. 32.

[20] Robertson, *King's Laws*, pp. 231, 239, 241, 245-51, 253.

[21] Ibid., pp. 277-93.

[22] Ibid., pp. 235-7; Plucknett, *Concise History*, p.12.

[23] Plucknett, *Concise History*, p. 101.

[24] Ibid., p. 102.

[25] Ibid., pp. 102-04. Actions under the Petty Assizes were brought to settle disputed questions concerning the possession of land.

[26] See, for example, *The Treatise on the Laws and Customs of the Realm of England Called Glanville*, ed. and trans. G.D.G. Hall (London: Nelson, 1965), pp. 171-77, hereafter cited as *Glanville*.

[27] 17 John, c. 24. Great Britain, House of Commons, *Statutes of the Realm* (1810-22; rpt. London: Dawson, 1963); hereafter cited as SOR.

[28] Plucknett, *Concise History*, p. 357.

[29] Edward Foss, *The Judges of England* (1848, rpt. New York: AMS Press, 1966), I, 57, 161, 332; II, 9, 159; P&M I, 133-5; William S. Holdsworth, *A History of English Law*, 7th ed. rev. (London: Methuen, 1966), II, pp. 179-80.

[30] Henry G. Richardson, "Azo, Drogheda and Bracton," *English Historical Review*, 59 (1944), 40; P&M, I, 122, 132-5; Plucknett, *Concise History*, p. 302; Holdsworth, HEL, II, 227.

[31] P&M, I, 134-5; Plucknett, *Concise History*, pp. 219, 297-8.

[32] Holdsworth, HEL, II, 180, 263.

[33] Ibid., II, 265; Plucknett, *Concise History*, p. 217.

[34] Holdsworth, HEL, II, 182; Theodore F.T. Plucknett, *Statutes and*

Their Interpretation in the First Half of the Fourteenth Century (Cambridge: Cambridge University Press, 1922), p. 7.

[35] Holdsworth, HEL, II, 424; Plucknett, Concise History, pp. 225, 228.

[36] According to Plucknett (Concise History, p. 239), the first practitioner raised to the bench on account of his eminence in the profession received his call in 1268. See also Holdsworth, HEL II, 182. By 1307 all judges of the King's Bench were laymen, as were three or four of the six judges of Common Pleas, and three of the five Exchequer barons; Foss, Judges, III, 1-176.

[37] An attorney was admitted to practice by the bench and was an officer of the court in the common law tribunals who performed routine procedural and clerical tasks for his clients. Solicitors later came to do like duties in the Court of Chancery. With the convergence and final fusion of law and equity in the nineteenth century the profession of attorney was abolished and the duties subsumed in that of solicitor. Judicature Act, 1873, 36&37 Vic., c.66, s.87 (Imp.). For detail see Holdsworth, HEL, VI, 448-57; Plucknett, Concise History, p. 226.

[38] Holdsworth, HEL, II, 265; Plucknett, Concise History, p. 217.

[39] Holdsworth, HEL, II, 417-8; Plucknett, Concise History, p. 225.

[40] Plucknett, Concise History, p. 237.

[41] Loc. cit.

[42] For a concise summary of the development of the doctrine, see ibid., pp. 342-50.

[43] Plucknett, Statutes, p. 1.

[44] Carl Stephenson and Frederick G. Marcham, eds. and trans., Sources of English Constitutional History, rev. ed. (New York: Harper & Row, 1972), I, 77-82.

[45] 17 John, SOR. See also James C. Holt, ed. and trans., Magna Carta (Cambridge: University Press, 1965), pp. 317-36 for a felicitous translation, and pp. 1-18 for an overview of the Charter's history.

[46] 1284, 12 Edw. I, SOR.

[47] 1279, 7 Edw. I, SOR.

[48] 1283, 11 Edw. I, SOR.

[49] 1293, 21 Edw. I, SOR.

[50] Computed from S.G. Edgar, ed., Chronological Table of the Statutes (London: HMSO, 1974); see also Claud Mullins, In Quest of Justice (London: John Murray, 1931), p. 132.

[51] SOR, I, xxi.

[52] Holdsworth, HEL, II, 440; see also Lord Brougham's Act, 1850, 13&14 Vic., c.21, s.2.

[53] Plucknett, Concise History, p. 324. For details of how this verbose style developed, see Holdsworth, HEL, IX, 369-76, especially 370.

[54] 1774, 14 Geo. 3, c.31.

[55] Henry G. Richardson and George O. Sayles, "The Early Statutes," Law Quarterly Review, 200 (Oct. 1934), 545; H.G. Richardson and G.O. Sayles, "The Provisions of Oxford," Bulletin of John Rylands Library, 17 (July, 1933), 295-6.

[56] Henry G. Richardson and George O. Sayles, "The King's Ministers in Parliament, 1272-1377," The English Historical Review, 184 (Oct. 1931), 536.

[57] Ibid., pp. 534-5. See also the discussion in Richardson and Sayles, "Early Statutes," pp. 544-5.

[58] Goronwy Edwards, The Second Century of the English Parliament (Oxford: Clarendon Press, 1979), pp. 45-55; Richardson and Sayles, "King's Ministers," p. 530.

[59] Although the characteristic form of this legislation had not fully evolved by 1307, the concept was obviously an element of the current legal lore, as evidenced by exchanges between counsel; Plucknett, Statutes, p. 12.

[60] In the event, and however it came about, this form of legislation came to predominate in the last years of Edward I's reign, and to become the preferred form of statutes for some hundreds of years thereafter. That other, more knowledgeable commentators have seen the matter in the same light is evidenced by the words of William Pitt, when speaking in the debate on the Nore Mutiny, and with particular reference to the criminal law: "The statute laws of this country were not the result of a systematic code; they had grown up to what they were by an accumulation of provisions made to suit offences as they occurred." William Cobbett, The Parliamentary History of England (1806-20; rpt. New York: Johnson Reprint, 1966), XXXIII, col. 807.

[61] Richardson and Sayles, "King's Ministers," p. 532.

[62] Loc. cit.

[63] Heinrich Brunner, "The Sources of English Law," in Select Essays in Anglo-American Legal History (1908; rpt. London: Wildey & Sons, 1968), II, 37. For evidence to support Brunner's statement see, for example, Book I of Britton itself, where it is laid down by Edward I that "we have caused such laws as have heretofore been used in our realm to be reduced into writing according to what is here ordained. And we

will and command, that throughout England and Ireland they be so used and observed in all points, saving to us the power of repealing extending restricting and amending them, whenever we shall see good, by the assent of our earls barons and others of our Council...." Francis Morgan Nichols, ed. and trans. (Washington, D.C.: John Bryne & Co., 1901), p. 1, passim. See also Holdsworth, II, 268, who quotes with approval from Nichols's "Introduction" to his 1865 ed. of Britton. Unfortunately, the writer could not obtain a copy of the 1865 edition for this work.

[64] Holdsworth, HEL, II, 268.

[65] Foss, Judges, III, 112.

[66] Richardson and Sayles, "King's Ministers," pp. 537, 549.

[67] Plucknett, Concise History, p. 265.

[68] Lawson, Common Lawyer, p. 79. See Lawson's interesting discussion on this point on pp. 79-80.

[69] Richardson and Sayles, "Early Statutes," p. 545.

[70] For example, see Holdsworth on the development of felony (HEL, II, 303 ff.) and Plucknett on the origin of the grand and petty juries (Concise History, pp. 109-13).

[71] P&M, I, 69-74.

[72] Glanville, p. 91. If the felon was a tenant-in-chief of the sovereign, his whole estate was forfeited to the crown.

[73] P&M, I, 304. See also Plucknett, Concise History, p. 442.

[74] Persons who were qualified to plead benefit of clergy were, of course, able to escape the death penalty: Plucknett, Concise History, p. 439 ff. For a full account of the evolution of the concept of benefit of clergy, see Matthew Hale, The History of the Pleas of the Crown, 1st ed. (London, 1736), I, 323-90. On the development of the concept of felony and its punishment generally, see Plucknett, Concise History, pp. 443-53; Holdsworth, HEL, II, 303-07, and James F. Stephen, A History of the Criminal Law of England (London, 1883), II, 192-4, hereafter cited as HCL.

[75] Plucknett, Concise History, pp. 424, 427; Holdsworth, HEL, I, 13-17.

[76] Stephenson and Marcham, Sources, I, 76-80; P&M, II, 642.

[77] For more detail, see P&M, II, 641-2; Plucknett, Concise History, pp. 109, 112; Holdsworth, HEL, I, 312 ff.

[78] Stephenson and Marcham, Sources, I, 77.

[79] P&M, II, 642-3, 652; Plucknett, Concise History, pp. 107, 112; Holdsworth, HEL, I, 319-21.

[80] Bracton on the Laws and Customs of England, ed. and trans. Samual E. Thorne (Cambridge, Mass.: Belknap Press, 1968), II, 328-33.

[81] Ibid., 330.

[82] Ibid., 402-4. Since there is good reason to believe that Bracton lectured on the Institutes at Oxford [Richardson, "Azo," pp. 41-5] and wrote Latin in the classical style, it is probable that when he used the term indictatus, he intended the classical meaning of the word, which was "to inform on," or "to lay information [against]"; Oxford Latin Dictionary (Oxford: Clarendon Press, 1973). See also Hale, Pleas of the Crown, II, 152.

[83] Bracton, II, 329; 1285, 13 Edw. I, c. 13, SOR.

[84] Holdsworth, HEL, I, 322; Plucknett, Concise History, p. 429; but see also P&M, II, 643, 649, for a comprehensive discussion of the subject. For the preparation of an indictment in the nineteenth century, see Stephen, HCL, I, 273-4, 293.

[85] Plucknett, Concise History, pp. 113-8.

[86] Ibid., p. 118; Holdsworth, HEL, I, 323.

[87] Plucknett, Concise History, p. 120; Holdsworth, HEL, I, 323-7. The personal "appeal" which was adjudicated by battle did not come under this ban. It was still a popular method of prosecuting a felony in the late years of Henry III; Bracton, II, 385, passim.

[88] Holdsworth, HEL, I, 324-5. While the form of the trial would be familiar to the modern viewer, the trial procedure was very different; pp. 323-7.

[89] P&M, II, 511-12, 526.

[90] Ibid., II, 520-22.

[91] Ibid., II, 653.

[92] See Courtney S. Kenny, Outlines of Criminal Law, 3rd ed. (Cambridge: Cambridge University Press, 1907), pp. 93-4 for a partial list of such differences. For a full treatment, see Hardinge Giffard, Lord Halsbury, ed., The Laws of England, 1st ed. (London: Butterworth, 1909), IX, 246, n.(c). Hereafter cited as Halsbury, 1st ed.

[93] P&M, II, 519-20; Plucknett, Concise History, pp. 421, 455-7.

[94] Plucknett, Concise History, pp. 458-9. For a partial list of misdemeanours as they stood c. 1890, see Stephen, General View, p. 65.

[95] Kenny, Outlines, p. 99. The first part of this quotation appears

to have been paraphrased from Stephen's *General View*, p. 45, and while it is in the present tense and thus describes the situation when it was written, the idea it so aptly conveys was current in the thirteenth century; Plucknett, *Concise History*, p. 455.

[96] Douglas Hogg, ed., *Halsbury's Laws of England*, 2nd ed. (London: Butterworth, 1931), IX, 146. See also *R. v. St. George* (1840), 9 Car. & P. 482 and note b, 173 E.R. 921; *R. v. Lovett* (1839), 9 Car & P. 462, 173 E. R. 912.

[97] P&M, II, 413. But see also pp. 497 and 518 for other, sometimes corporal punishments meted out to misdemeanants.

[98] Plucknett, *Concise History*, pp. 442, 456-7.

[99] Ibid., p. 177.

[100] Ibid., p. 424.

[101] Stephen, HCL, I, 282.

[102] 2 Edw. 3, c. 3, SOR.

[103] 1 Hen. 5, c. 3, SOR. Statutory misdemeanours later came to be brought on by *ex officio* informations, in imitation of an earlier practice in king's bench, and to be tried by an inquisitorial process in the Court of Star Chamber. But the former practice had become a rarity by the late nineteenth century [Halsbury, 1st ed., IX, 329, n. (v)], while the latter ceased when the Star Chamber was abolished; Holdsworth, HEL, IX, 237-45.

[104] 37 Edw. 3, c. 19, SOR.

[105] 18 Hen. 6, c. 19, SOR.

[106] Detail in Plucknett, *Concise History*, pp. 167-9; Holdsworth, HEL, I, 291.

[107] 34 Edw. 3, c. 1, SOR. The authority of justices of the peace, sitting as a court of quarter sessions to try capital cases, was abolished in the eighteenth century. Plucknett, *Concise History*, p. 169.

[108] 11 Hen. 7, c. 3, SOR.

[109] Plucknett, *Concise History*, p. 438.

[110] Ibid., p. 439.

[111] William Blackstone, *Commentaries on the Laws of England*, 1st ed. (1769; rpt. Chicago: University Press, 1979), IV, 278.

[112] For example, compare the details of An Act Concerning Flax and Hemp, 1532-3, 24 Hen. 8, c. 4; An Act For the Punishment of Vagabonds, 1547, 1 Edw. 6, c. 3, s. 1; An Act Concerning Drovers of Cattle, 1562, 5

Eliz. 1, c. 11, s. 4; An Act for Repressing Drunkenness, 1623, 21 Jac. 1, c. 7, s. 4.

[113] The reader will notice a certain clumsiness of expression in any discussion concerning offences punishable on summary conviction. The reason why is simple and is best explained by Stephen: "For this class of offences which are extremely numerous in our law we have no distinct name" (HCL, II, 194). His remark was made in 1883, but the situation has not changed in the ensuing hundred years. The French have contraventions, the Germans have Ubertretungen, but the English, and likewise the Canadians as inheritors of the English system, have not yet devised a comparatively succinct term.

[114] By 1907 there were still "some hundreds of [such] offences," despite the penal reforms of the nineteenth century; Kenny, Outlines, p. 431.

[115] Summary Proceedings Act, 1823, 3 Geo. 4, c. 23.

[116] 11 & 12 Vic., c. 43.

[117] Kenny, Outlines, p. xxi, passim.

[118] Herbert Broome, Commentaries on the Common Law, 4th ed. (London: William Maxwell & Sons, 1869), p. 896.

[119] Radzinowicz, HECL, I, 1-7. These statutes defined offences for which the mandatory punishment was death and forfeiture, and in which the sentence was routinely carried out if no mitigating circumstance supervened. Whether or not a person convicted of one of these felonies was in fact executed is another question and one which is beyond the scope of this study.

[120] 9 Geo. I, c.22. See Radzinowicz, HECL, I, 49-79 for detail; p. 76 for statistics.

[121] Holdsworth, HEL, IV, 512-21; Stephen, HCL, I, 489.

[122] Holdsworth, HEL, III, 276-77.

[123] For an overview of Bentham's influence on penal reform in England, see Radzinowicz, HECL, I, 355-96.

[124] It may seem odd to see Blackstone's name included with Bentham's as a reformer, but when one looks carefully at Volume 4 of the Commentaries, it is apparent that his strictures on the criminal law as it existed were pointed and wide-ranging: for example, see p. 349, where he criticizes the rule which forbids counsel to act for a person accused of felony, or p. 381, where the punishments of escheat and forfeiture are condemned. Moreover, it is to be remembered that the same remarks were an integral part of the lectures he delivered at Oxford over a fifteen-year period (1753-67) to many of the future leaders of the nation. Bentham, of course, was an auditor of Blackstone; see his account of the lectures and the audience in Bowring, Works, X, 45. See

also Radzinowicz's remarks on this subject, HECL, I, 345-8; and Holdsworth's comments, HEL, XI, 579.

[125] Radzinowitz, HECL, I, 301-54, 399, *passim*.

[126] Ibid., IV, 345.

[127] Ibid., I, 551-54; IV, 342. In fact, arson in dockyards was considered to be a species of treason (p. 321).

[128] Forfeiture Act, 1870, 33 & 34 Vic. c. 23, s. 1.

[129] Larceny Act, 1891, 24 & 25 Vic. c. 96, s. 38; discussed in Sir James Fitzjames Stephen, *A Digest of the Criminal Law*, 6th ed. (London: Macmillan, 1904), p. 294; hereafter cited as DCL.

[130] Kenny, *Outlines*. p. 97: Stephen, HCL, I, 488.

[131] Offences Against the Person Act, 1861, 24 & 25 Vic. c. 100; discussed in Stephen, DCL, p. 193.

[132] Kenny, *Outlines*, p. 97. For other substantial differences, see the Report of the Commission on the Law Relating to Indictable Offences. Parl. Pap., 1878-79 [2345], XX, 14-15. See, too, Stephen's forceful discussion on these anomalies, HCL, I, 488-89; II, 193 .

[133] Stephen, DCL, "Table of Indictable Offences," pp. 433-56. The earliest enactment cited is the Statute of Treasons, 1352, 25 Edw. 3, while the latest is the Larceny Act, 1901, 1 Edw. 7, c. 10.

[134] Stephen seems to have included only the offences which came before the courts routinely. For example, in his discussion of offences concerning explosives, he makes no mention of the misdemeanour of making gunpowder for unlawful purposes; 1861, Malicious Damage Act, 24 & 25 Vic. c. 97, s. 54.

[135] For examples, see Stephen, HCL, I, 219, 239, 241, 441.

[136] 11 & 12 Vic. c. 42.

[137] 1554, An Act Concerning Bail, 1 & 2 Ph. & M. c. 13. See also Stephen, HCL, I, 219.

[138] Halsbury, 1st ed., IX, 320.

[139] Ibid., IX, 290-92.

[140] Ibid., IX, 313-18.

[141] Ibid., IX, 321.

[142] Kenny, *Outlines*, p. 456.

[143] Halsbury, 1st ed., IX, 331, 333.

[144] Ibid., IX, 334. This is not a hypothetical sequence of events. Such cases did happen. Perhaps the most famous was that of Sir Francis Truscott, Lord Mayor designate of London. While on vacation he was the subject of an information to a magistrate which accused him of libel. The magistrate refused to proceed on the information for lack of supporting evidence, whereupon the accuser took his complaint to the grand jury, who found a true bill. On his return to London, Sir Francis learned of the charge only when he was summoned to his trial. The trial jury stopped the case and acquitted him without leaving the jury box. See the report in The Times, September 22, 1879, p. 8. See also the editorial the following day (September 23, p. 7), which castigated the grand jury system and the correspondence the case generated in the following weeks for an exhaustive discussion of the merits and faults of the institution. Similar correspondence also occurred in 1857, 1859, 1864, 1866 and 1888; and, no doubt, later, since the grand jury was not abolished (for criminal purposes) until 1933.

[145] Ernest L. Woodward, The Age of Reform (Oxford: Clarendon Press, 1954), p. 439.

[146] John A. Kains, How Say You (St. Thomas, Ont., 1893), p. 11.

[147] In 1846, the Attorney General recommended to the Home Office that the grand jury be abolished; the following year a bill was brought in to achieve this end but was dropped. Similar bills were introduced in 1852, 1857, and 1859, but were not proceeded with for various reasons. Perhaps the fate of the last one is typical. It was introduced by a former Lord Chancellor, Lord Chelmsford, who pushed it through to third reading and then withdrew it when it was attacked by a judicial colleague from his own party Lord Lyndhurst, who had uttered no word of opposition during the first two readings. For details see the speech of Lord Chelmsford in Hansard, March 10, 1859, cols. 1610-17.

CHAPTER V

The first English judges and lawyers must have had prodigious memories for, in the absence of written records, judgement in litigation was given in accordance with oral custom generated over the years in a succession of cases.[1] However, with the steady increase in the number of statutes and judicial decisions from the thirteenth century on, it soon became necessary to devise some system whereby copies of the former and reports of the latter would be made available, preferably in a handy but compendious form.

There were two possible ways to provide such documents: by individual initiative or by government action. For nearly five hundred years private enterprise undertook both tasks, although not always with ideal results. From an early date, legal practitioners gave the problem of case law their earnest attention and, over the centuries, eventually worked out a method of preserving it for posterity by recording in writing the relevant details of a case and the pith or essence of the judgement. The anonymous and frequently obscure "Year Books" which made their first appearance in the reign of Edward I are the earliest compilations by which an attempt was made to achieve this ideal. These merged into the "Reports" of Henry VIII's reign, which are prefaced by the name of the distinguished judge or lawyer said to have written them.[2] However:

> Until the end of the seventeenth century the reports varied very greatly in character and quality. Some of them were little more

> than bare notes of simple facts and findings, or the statement of a rule; others were long, and not always very coherent, accounts of what took place at the trial. Some of the earlier reports were written in a very garbled form of Anglo-Norman mingled with English and are couched in such ambiguous language and expressed with such brevity that the modern mind can hardly appreciate the point which they are meant to decide."[3]

It was not until the middle of the eighteenth century that the reports began to assume their modern form, and not until 1865 that the profession formed the Council of Law Reporting which then began to issue reports written according to a standard format.[4]

Statute law also claimed the attention of early private practitioners. The first collection of which there is record is the Vieux Abridgement, published about 1480. It is a digest in the original Latin and French, arranged alphabetically according to subject and covering the period from the early years of the thirteenth century to 1455.[5] It was closely followed by an unexpurgated version, again in the original language, which included the statutes from 1327 to 1482.[6] This volume, together with the book of statutes printed in English after each session of Parliament from about 1486 on, would probably have kept the average practitioner up-to-date. However, for the antiquarian or the lawyer who needed an ancient precedent, there was an urgent need for copies of the statutes and charters antecedent to Edward II. This need was filled in 1508 by Pynson's Antiqua Statuta, which reprinted these enactments in the language of the original.[7] Thereafter, the abundance of collections becomes confusing. Some abridgements purporting to include all the statutes to the date of publication were printed entirely in English and arranged chronologically, but they did not include the original Latin and French texts. Another was published in

French about 1528, even though English had been the language of publication in Parliament for at least forty years. Moreover, as any researcher becomes painfully aware, in such collections the chronological order is often faulty and the regnal year wrong, to say nothing of the confusion caused when an abridger omits a phrase, sentence, paragraph, or an entire statute without alerting the reader. It was not until the latter part of the eighteenth century that collections began to be authoritative, and even in these mistakes abound; furthermore, their format is inconvenient for readers not educated in the classical tradition. For example, in Ruffhead's Statutes at Large which began publication in 1762, regnal dates of statutes in the early reigns differ from those in Statutes of the Realm by as many as six years, and some statutes are omitted;[8] and in both Ruffhead's collection and Pickering's collection of 1762-69, many of the first statutes are printed in the original language, without a translation.[9] In short, it was well said by Sir Carleton Allen that "until the Statutes of the Realm were published [1810-25], our enacted law was disorderly to an almost incredible degree."[10]

During the sixteenth and seventeenth centuries particularly, many attempts were made in Parliament to bring order to the statutes, but the appearance of Statutes of the Realm marked the first occasion when the legislators were able to agree on any large scheme and to carry it through to completion. The absence among available sources of an explanation for the failure of all previous initiatives is provoking and an intensive investigation of the earlier doomed attempts proves enlightening not only for this period in the history of English law, but also for later Imperial and Canadian codification measures. It should not be thought that the confusing accretion of statute and case law went unnoticed. On the contrary, many articulate and trenchant critics made their views known over the years. But while some confined their observations to the laws, many formulated their strictures within the larger context of a general criticism of the whole common law system which, by the early sixteenth century, would seem to have been vulnerable to such attacks.[11]

One of the first such critics of whom there is record was Sir Thomas More. In Utopia, first published in 1516, he makes clear his dissatisfaction with a system of "laws which other [either] be in numbre mo then [than] be able to be readde, or els blinder and darker, then that any man can well vnderstand them."[12] As a consequence, said More, in what was probably an allusion to Henry VII's rapacious "king's legal counsellors," Edmund Dudley and Richard Empson, a courtier was able to suggest that the royal coffers could be filled by putting

> the kyng in remembraunce of certeyn olde and moughte-eaten lawes, that of long tyme haue not bene put in execution; whiche, because no man can remembre that they were made, euerie man hath transgressed. The fynes of thies lawes he counselleth the kynge to require: for there is no waye so proffytable, nor more honorable; as the whiche hath a shewe and colour of justice.[13]

More compares these conditions unfavourably with those existing in Utopia where "thei haue but few lawes." Furthermore,

> they vtterly exclude and bannyshe all proctours and sergeauntes at the lawe, which craftely handell matters, and subtelly dispute of the lawes. For they thinke it most mete, that euery man shuld pleade his owne matter, and tell the same tale befor the iudge, that he would tel to his man of lawe. So shall there be lesse circumstaunce of wordes, and the trwth shal soner cum to light; whiles the iudge with a discrete judgement doth waye the wordes of hym whom no lawier hath instruct with deceit. . . .[14]

Coming from a practising lawyer, this is harsh criticism indeed. In 1529, thirteen years after Utopia was published, More was appointed

Chancellor and began to practice what he preached in his own court, Chancery.[15] Moreover, there is little doubt that he intended to institute some measure of systematization to the statutes, for when he delivered the throne speech to the Parliament of 1529, he told the members that they had been summoned, in part, to reform "divers laws, [which] by long continuance of time and mutation of things~~,~~ were now grown insufficient and imperfect . . . ."[16] That no codifying legislation to effect this end was introduced during More's short tenure is not surprising in view of his work in Chancery and, probably to a greater degree, in view of the labour entailed ~~in~~ attempting to resolve Henry VIII's "great cause." But Sir Thomas was not alone in recognizing the problems.

Thomas Cromwell, Henry VIII's chief minister after 1532 and the architect of the Henrician Reformation, used the statutes enacted by the Parliament of 1529 as his building blocks.[17] As Profes[illegible] G.R. Elton has shown, many of the concepts and ideas in such legisla[illegible]n were Cromwell's own; but many were culled from the writings of a group of humanistic intellectuals who looked to the minister for favour and patronage.[18] Among them was Thomas Starkey who "proposed the codification of the common law, in either English or Latin . . ." and who "asked for the restraint and utter extinction of abuses of lawyers."[19] In the same vein Richard Morrison advanced a scheme for codification and dilated on the need for a humanistic education for lawyers, instead of one in which "they want to learn nothing that does not bring immediate profit."[20] While neither of these proposals were put before Henrician parliaments, Starkey and Morrison must have been voicing popular sentiments, for in 1534 a petition was addressed to the

King which complained of, inter alia, delays during court proceedings, legal hair-splitting, excessive fees, and the misconduct of judicial officers, and which prayed for the enactment of legislation to abolish such abuses.[21] In particular, the petitioners said: "soo many lerned men [i.e. lawyers] byn rulers in your commen house ayenst whome noo man ther dar ne may make eason [sic] in any cause ayenst their advayles or profetts."[22]

It was at this time that Henry VIII was attempting to push a bill through Parliament that would have restored to him revenues from feudal incidents such as wardship and marriage which, over the centuries, had become nugatory by virtue of a legal device known as a "use."[23] A bill to nullify the use was introduced in the Commons in 1529 which, if passed, would have deprived the large landowners in that chamber of "the power of making secure family settlements and secret conveyances," while "the lawyers saw themselves deprived of a large amount of profitable business. It is not surprising therefore that measures which roused the hostility of the two most powerful interests in the House of Commons came to nothing."[24] New bills were introduced in 1531 and 1532, to no avail. However, when the petition of 1534 came to hand, it gave the king a club with which to threaten the lawyers: they could vote for the bill or face a thorough-going reform of the profession. Having previously forced the landowners into line, Henry was then able to return to Parliament in 1535 and secure passage of a far more stringent bill than those of former years.[25] And, in accordance with the quid pro quo, nothing more was heard of reform of the legal profession.

However, the king decided that he wanted to know more about the education of lawyers and what additional instruction would be needed to educate selected students in the arts of diplomacy and statesmanship at a new "house of students" which he proposed to erect.[26] Accordingly, a commission was struck and ordered to make recommendations.[27] When formed, it consisted of three civil servants, one of whom was Nicholas Bacon, the young and able solicitor of the Court of Augmentations who, like Starkey and Morrison "seems to have been well versed in and sympathetic to the humanist ideas of his day . . . ."[28] The Commissioners' Report consisted of two parts: first, a detailed description of the prevailing system of legal education and second, a plan to implement the monarch's intention.[29] In part one, the Commissioners outlined the rigorous curriculum of oral argument in law-French and the subtle learning derived from the annual law reading and its ensuing discussions and debates; they explained the domestic organization of the Inns of Court, a subject of more than ordinary interest since an individual contemplating a legal career usually had to remain in residence for seven years before his call to the bar.[30] In the second part, they suggested that the syllabus as taught in the Inns of Court be augmented by a humanistic programme of instruction in the classics, in which the teaching of the "pure French and Latin tongues" would bulk large, and by training in the martial arts.[31] While these were indeed radical innovations, they were to be additions to the programme of legal instruction for a limited and specific purpose, not amendments to it. In fact, the Report contained no criticism, found no fault, and recommended no changes to the legal curriculum. This is not surprising since two and possibly all three of the Commissioners had been educated at the Inns of Court.[32]

Thus, while it may be seen from his later actions that Bacon came to share Starkey's enthusiasm for codification during his tenure as Lord Keeper, it is clear that he did not see eye to eye with Henry VIII's petitioners on legal reform. In any event, More's successor as Lord Chancellor, Thomas Audley, did nothing to implement the scheme. But he did again focus attention on obscure and outdated enactments when he told the newly convened Parliament of 1542 that "many laws to the no small hurt of commonweal, remain perfectly unknown."[33] It was, in part, to correct this situation, said Audley, that the assembly had been called. Nevertheless, if any action was taken during the last years of Henry VIII's reign, the record has not come to light.

Lord Chancellor Rich's speech opening the first Parliament of Edward VI was not recorded,[34] but he probably made mention of the need for reform of the statutes. This may be inferred from the fact that early in the session a bill was introduced "for the Reformation of divers Laws and Process in the Laws of this Realm."[35] It was read a second time a week later as the last item of business for the day. Then, in an unusual occurrence for the period, the whole of the next day's sitting was devoted to a debate on "the Argument for the Reformation of the laws of this Realm."[36] There is no record of a third reading.

In the following session a new bill for "The Process and Orders of the Common Law" successfully passed all stages in the Lower House and was sent on to the Lords.[37] In that chamber it was given first reading on March 12, 1549;[38] there is no mention of any further action. It is evident, however, that Edward VI was not pleased with the fact that there were by now many hundreds of ancient and unremembered, but nevertheless enforceable, statutes mouldering in the Tower. This precocious boy made his thoughts known in a remarkable paper, "Discourse on the Reform of Abuses in Church and State," written in 1551 when he was fourteen years old. He wished, said the King, that

> when time shall serve, the superfluous and tedious statutes were brought into one sum together and made more plain and short, to the intent that men might the better understand them, which I think shall much help to advance the profit of the commonwealth.[39]

Unfortunately for posterity, the paper is unfinished and Edward died before he was able to put the policy into effect himself. Thus, as the years added more statutes to those already in the Tower, so the enormity of the task of codifying the whole of the enacted law was increased.

It may have been for this reason that a new direction was taken in the next parliamentary attempt at codification. Instead of the totality of the statutes, the criminal acts were singled out for attention in the second Parliament of Philip and Mary in 1555, when the bill "that certain Persons may peruse the penal Laws, to bring them in short form"[40] was introduced. Although it must have been a much more manageable proposition than the bills which had gone before, it too received short shrift and did not get beyond second reading.[41] Nevertheless, governmental interest in codification did not slacken, as was amply demonstrated in the following reign.

A month after her accession to the throne in November 1558, Elizabeth I appointed her father's reforming commissioner, Nicholas Bacon, to the Lord Keepership. In the throne speech to the first Parliament of the new reign in January of the next year, Bacon told the members that a prime duty of the assembly would be to consider

> whether the laws, before this time made, be sufficient to redress the enormities they were meant to remove; and whether any laws made but for a time be meet to be continued for ever, or for a season. Besides, whether any laws be too gentle: to be short, you are to consider all other imperfections of laws made, and all want of laws to be made, and thereupon to provide the meetest remedies.[42]

The Journals of that Parliament do not record the introduction of any remedial legislation. Possibly for this reason the Lord Keeper occupied himself with practical measures within his own competence to facilitate the administration of justice both for himself and for his appointees, the justices of the peace.[43] One such innovation which shows the set of his mind in this respect was the issue to every shire in 1561 of an abridgement or digest of the statutes, which found such approbation among the magistrates that it was reissued the following year.[44]

In 1563, a new Parliament was called and the Lord Keeper returned to the theme of systematization expressed in his first speech when he instructed the assembly

> to consider, if there be not too many laws for one thing; and those so large and busy, that neither the commons can understand the same, nor yet well the lawyer, which would be brought into some briefer and better order, and there executed.[45]

Again, nothing was done. But Bacon refused to let the matter rest. In the two succeeding Parliaments, he returned to the subject again and again and made clear his concern about the adverse effect the mass of statutes was having on the administration of the law: he told the legislators in 1572 to "examine whether there are too many laws for any one thing; which breedeth so many doubts that the subject is sometimes to seek how to observe them, and the chancellor how to give advice concerning them."[46] But all his exhortations were to no avail. More to the point, however, in 1575 the Lord Keeper drew up a plan to reduce and order the statutes which, if implemented, would have formed a comprehensive bill for consideration in a subsequent session of Parliament.[47] It is instructive to read the heads of this plan in the light of both antecedent and subsequent events:

First where many lawes be made for one Thing, the same are to be

> reduced and established into one Lawe, and the former to be abrogated.-Item, where there is but one lawe for one Thing, that these Lawes are to remain in Case as they be.-Item, that all the Actes be digested into Titles, and printed according to the Abridgement of the Statutes.-Item, where Part of one Act Standeth in force and another Part abrogated, there should be no more printed but that that standeth in force.[48]

It will be noted that in this short paragraph Bacon proposed three procedures that were later to become known as consolidation, statute law revision and codification. If any action ensued, the record has not been discovered.

Nevertheless, the government persisted and successive Lord Chancellors repeatedly informed Parliament right to the end of the reign that it must abridge and otherwise reformulate the enacted law.[49] Accordingly, various committees consisting principally or wholly of members of the legal profession were struck by the House of Commons for that purpose.[50] Additionally, in a manner similar to Bacon's initiative of 1575, a group of legal experts was employed by the government in 1588 to assist in drafting legislation to systematize the statutes.[51]

While most of these initiatives were concerned with the whole of the enacted law, two at least followed the lead of Philip and Mary's second Parliament and singled out the penal laws.[52] Responding to the speech of the Lord Keeper in 1601, the courtier, Sir Edward Hobbie, said that many of these

> were like thorns that did prick but did yield no fruit; And that they being not looked into, it bred in us an alteration in manners . . . Times were not as they have been, and therefore the necessity of time makes a necessity of the alteration of Laws, with many other circumstances touching the shortness of Statutes, and commending the proceedings of former ages, he concluded with a desire of a committee."[53]

This was the last occasion that an effort was made to codify or otherwise systematize the law in an Elizabethan Parliament. But while it was abortive, as had been all previous attempts, the session was otherwise notable for the fact that Francis Bacon, the son of Elizabeth's first Lord Keeper, was selected to be a member of the committee.

Concurrent with this activity in Parliament, many perceived defects in the legal system were being revealed by historians and commentators who wrote in the vernacular and whose volumes evidently reached a large readership, since they were invariably issued in several reprints and revised editions. In Richard Grafton's Chronicle, for example, first published in 1568, the author dwells on the iniquity of William I in changing the ancient laws to his own advantage and causing "those lawes to be set forth in the Norman language to aduaunce his owne tongue as a worthy and famous speech, and condemning ours as vile and barbarous: the which lawes are yet with vs in the same tongue."[54] He later recounts that, prompted by a complaint of Parliament to Edward III that court proceedings were in law-French, it was enacted that "all plees, which are to be pleaded in any of the Kings Courtes . . . shal be pleaded . . . in the Englishe tongue, and that the same be entred and enrolled in Latyn."[55] The latter direction was followed to the letter--to the discomfiture of the litigant who could read only English--but the former was ignored; French remained the language of the law and the courts.[56] Ten years later, Raphael Holinshed covered the same ground in greater detail and also echoed Thomas More on the profusion of the laws, there being so many that "no subject can liue without the transgression of some of them . . . ."[57] Additionally, in his discussion of the courts he remarked that, since "all the wealth of the land doth [now] flow vnto our common lawiers,"[58] the nobility and clergy had been ousted from their pre-eminent positions as controllers of the land and riches of the nation. Perhaps the most interesting item in Holinshed's account is an anecdote he relates to illustrate, in part, how this flow is occurring:

> A friend of mine also had a sute of late of some valure, and to be sure of counsell at his time, he gaue vnto two lawiers (whose names I forbeare to deliuer) twentie shillings a peece, telling them of the daie and houre wherein his matter should be called vpon. To be short, they came not vnto the barre at all, whervpon he staied for that daie. On the morrow after he met them againe, increased his former gifts by so much more, and told them of the time, but they once againe serued him as before. In the end he met them both in the verie hall doore, and after some timorous reprehension, of their vncourteous demeanour toward him, he bestowed either three angels or foure more vpon each of them, wherevpon they promised peremptorilie to speake earnestlie in his cause. And yet for all this, one of them hauing not yet sucked enough, vtterlie deceived him: the other in deed came in, and wagging a scroll which he had in his hand before the iudge, he spake not aboue three or foure words, almost so soone vttered as a good morrow, and so went from the bar [sic.], and this was all the poore man gat for his monie, and the care which his counsellours did seeme to take of his cause, then standing vpon the hazard. But inough of these matters, for if I should set downe how little law poore men can haue for their small fees in these daies, and the great murmurings that are on all sides vttered against their excessiue taking of monie (for they can abide no small gaine) I should exend this treatise into a farre greater volume than is convenient for my purpose.[59]

While the absolute veracity of this account may be questioned, it is apparent that it represents a literate layman's perception of the legal profession and its methods. Whatever their influence upon the literate, historians were not the only or even the most articulate group of writers to appeal to the public at large, for as Professor L. Woodbridge points out, "Lawyers, magistrates, and serjeants represent to dramatists the corruption of the legal system by money,"[60] and, as such, provided irresistible targets for their barbed criticism. Accordingly, playwrights such as Shakespeare, Ben Jonson and George Chapman improved on Holinshed and peopled their plays with greedy advocates who "make a good living out of human misery" and corrupt judges, such as "the governor in The Widow's Tears [who] prides himself on being so impartial that he will take bribes from anyone."[61] It was, of course, the commission of this offence which caused the downfall of Francis Bacon.

This brilliant man, who was to become Lord Chancellor, was born in 1561, the year his father issued the first abridgement of the statutes. He thus grew almost to manhood as the son of the chief law officer of England; he was also the nephew of William Cecil, Lord Burghley, the Queen's principal minister and Lord Treasurer. A precocious youngster early destined for the law, he drew upon himself the "special notice of the Queen herself, who would often talk with him and playfully call him the young Lord Keeper."[62] Hence, Francis Bacon was undoubtedly aware of his father's view on digesting and codifying the statute law and of the elder Bacon's plans to achieve this end. That he had himself made a comprehensive study of the project and supported it is evident from the opening remarks of his first recorded speech in the Parliament of 1593, when he outlined the processes whereby the Greeks and the Romans evolved their first codes.[63] Following the same theme in "The Epistle Dedicatory" to his Maxims of the Law (1596), he compared the Queen to Justinian and Edward I.[64] In particular, he praised her long-standing and often stated intention "to enter into a general amendment of the state of your laws, and to reduce them to more brevity and certainty."[65] Francis Bacon was, therefore, a natural choice for Sir Edward Hobbie's committee in 1601. Moreover, when coupled with his ambition for personal advancement, his knowledge and interest in codification made him a valuable ally of James I in the repeated attempts that monarch made to achieve a measure of codification.

In the early days of the new reign, it seemed that the King would achieve some measure of success in this endeavour. The Commons, as one of the first orders of business in the Parliament of 1604, formed a committee for the "Continuance, Repeal and Reviving of Statutes."[66] Its members included all the serjeants in the House, most of the other lawyers, and a few lay members.[67] But although there was a flurry of activity, nothing appears to have been accomplished. James persisted. Some years later, when the Government formulated a plan for the legislative Union of England and Scotland, the king observed in the course of his address to Parliament on this subject, that the proposal did not contemplate the abolition of the laws "but only the clearing and sweeping of the rust of them,"[68] and he urged the members to take advantage of the opportunity thus offered to effect a major reform. But even though the weight of the throne was behind the scheme, and despite the eloquence of Sir Francis Bacon who was its warmest champion, any idea of codification disappeared from view in the welter of opposition to Union.[69]

The Government returned to the subject in the session of 1610 when, in words reminiscent of those uttered by Nicholas Bacon in 1572, the Lord Treasurer, opening the Session in the House of Lords, complained that the Crown was required to execute penal laws "which in number and in divers other respects are very burdensome to the subjects, some of them being unpossible to be observed."[70] In a bid for direct action, he then seconded a motion of the Lord Chancellor that a committee of judges be appointed to view the penal statutes and to recommend which should be repealed.[71] This was done and a list of "snaring" statutes was compiled, but no further action is recorded.[72] It may be that the list did not meet with governmental approval, or that it was mislaid or lost, because four years later Francis Bacon, now Solicitor General, introduced a Bill of Grace to the Addled Parliament which called for the appointment of commissioners to do exactly the same thing.[73] Some headway was made and sub-committees were appointed, but their labour came to nothing in that acrimonious and abortive assembly.[74] A similar initiative in 1621, during Bacon's tenure as Lord Chancellor, was equally void of results, even though the parliamentary committee formed in that year was provided with a preliminary report prepared by colleagues which had found "almost 400 statutes fit to be repealed as being snares to us."[75] So ended the last recorded effort of the legislature to systematize the penal laws, or the statute law as a whole, for nearly thirty years.

Outside Parliament, criticism of the legal system continued unabated. However, apart from the historians Speed, Martyn and Samuel, who reiterated the general and unco-ordinated complaints of their Elizabethan predecessors, such criticism now tended to be specific and directed at a particular component of the system. For example, while Attorney-General Coke revered the common law "which hath been refined and perfected by all the wisest men in former succession of ages,"[76] he found fault with many of the old penal statutes which "remain but as snares to entangle the subject withal."[77] For these, he advocated repeal and for the remainder, codification: they should be formed into

> one plain and perspicuous law divided into articles, so as every subject may know what acts be in force, and what repealed, either by particular or general words, in part, or in the whole, or what branches and parts abridged, what enlarged, what expounded: so as each man may clearly know what and how much is of them in force, and how to obey them, it were a necessary work, and worthy of singular commendation . . . for as they now stand it will require great pains in reading over all, great attention in observing, and greater judgment in discerning upon consideration of the whole, what the law is in any one particular point . . . .[78]

Of course, Francis Bacon shared Coke's views about ancient criminal enactments. But the horizon of his concern was much wider since he saw large flaws in the whole of the law, both statute and common. Furthermore, in a memorandum to James I in 1616, when he was Attorney General, he argued that such faults were the causes of large defects in the legal system as a whole: bench, bar, courts and procedure.[79] As a corrective, he then put forward the most concise yet comprehensive plan of reform of the several he had proposed over the years. His essay is a pleasure to read, not only for its graceful and literate expression, but also for its mode of presentation, which has remained untouched by the years.

In many respects Bacon's proposals are as relevant today as when they were made. Moving to them by a series of questions and answers which anticipated and responded to possible objections to his plan, he demonstrated his considerable erudition by reference to the classical authorities, especially Justinian, in order to give his argument historical perspective and to ground it in precedent. His model was surely The Civil Law. He proposed consolidating and digesting the common law, producing a treatise for law students on the model of the Institutes, together with a law dictionary, and making a code of the statute law.[80] For the digest, however, he did propose one change to the ancient plan and that was to arrange the work chronologically, rather than by topic, in order to keep it in conformity with the Year Books. While the production of the digest and the ancilliary works would be within the competence of the executive, since they would be prepared by government appointees, ordering the statute law was a parliamentary responsibility and, as experience had demonstrated, the process would need skillful management if it were to be well done or, indeed, done at all. In a most perceptive passage showing his awareness of this fact, Bacon suggests that since "the houses will best like that which themselves guide, and the persons that themselves employ," James should follow earlier precedents whereby commissioners would be "named by both houses; but not with a precedent power to conclude, but only to prepare and propound to Parliament."[81] Furthermore, he was careful to specify that he "dare not advise to cast the law into a new mould. The work which I propound tendeth to proyning and grafting the law and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation."[82] Hence, if his plan were followed "the entire body and substance of the law [would] remain, only discharged of idle and unprofitable or hurtful matter."[83] He also made it clear that these exhortations were intended to propitiate and thus forestall opposition from the bench and bar of the common law.[84] And he had good reason to do so, for the barristers in the Commons were a strong and united force, as had been demonstrated in 1610.

In that year, Sir Thomas Edmondes, a courtier and senior diplomat, had introduced a bill in the Commons for the naturalization of English ambassadors' children born abroad. During a period when he was on a mission to Paris, the bill was sent to a committee which included "all the Lawyers of the House," where it was read and debated.[85] Of the debate, a colleague, Dudley Carleton, reported to Edmondes that "the lawyers generally oppose it, and by reason of some that were hot on it, the Further Trial was put off until Friday next . . . ."[86] A few days later, Carleton wrote that "your Bill of Naturalization is likewise in danger to be buried; for the lawyers generally oppose against it . . . I find so small inclination in the lawyers principally to press the bill, that it is better to sleep in the hands of the committee, than be brought to the House and rejected . . . ."[87] To close out the incident, a later letter from Carleton said that "your bill is laid asleep for this session, without further hope of proceeding . . . ."[88] Thus it can be seen that, as in the time of Henry VIII, a cause was unlikely to be advanced successfully in Parliament against the opposition of the common lawyers.

This fraternity was also interested in legal reform, but it had quite different aims from those of the King and his law officers. Its targets were the prerogative courts and, ultimately, the source of their power, the sovereign. Led by Sir Edward Coke, legal antiquarians and lawyers such as John Selden, John Pym and Sir John Elliot provided many of the arguments and much of the debating power used against the King's Government. In the event, and after an eleven-year period of prerogative government, Parliament won the battle which, in large part, was a victory for the common law.[89] This was accomplished when Star Chamber and most of the other prerogative courts were abolished or withered away in the early days of the Long Parliament.

On the other hand, nothing was heard of statute or other legal reform during the decade of government by the Privy Council. Nor was there any substantive action during the first years of the Long Parliament, notwithstanding the motion made in the Upper Chamber in 1641, "That some Lords might be appointd to consider of the obsolete laws, and penal statutes . . ."[90] and the clause in the Grand Remonstrance which laid down that a primary objective of the legislators would be "the regulating of Courts of Justice, and abridging both the delays and charges of Law Suits . . . ."[91]

However, even before the defeat of the Royalists, the realization by the commonalty that there was to be no real thrust for the reforms they desired[92] caused an avalanche of written protest to thunder down on the legislators and society at large. By 1661, George Thomason had collected and catalogued over 22,000 pamphlets, broadsheets and other manuscripts issued during the previous twenty years, well over half of which were published prior to 1650.[93] While the subject matter of such works covered a wide spectrum of protest after the Royalist defeat in 1646, the legal system came under increasing attack from men who must have been informed by Holinshed and later historians. For instance, in John Lilburne's "Remonstrance of Many Thousand Citizens," issued in 1646, he castigates the Norman invaders who made the English people slaves and had since held them in bondage, and then details the received view of the law:

> . . . the Conquerer, contrary to his Oath introduced the Norman lawes, and his litigious and vexatious way amongst us; the like he did also for punishment of malefactours, Controversies of all natures, having before a quick and finall dispatch in every hundred....He erected a trade of Judges and Lawyers, to sell Justice and injustice at his owne unconscionable rate, and in what time hee pleased; the corruption whereof is yet remaining upon us, to our continuall impoverishing and molestation; from which we thought you should have delivered us.[94]

Although Lilburne confidently expected that legislation would release the English people from their "Norman bondage," he did not form any coherent plan. Much more specific in this respect was a clause in "The Case of the Army Truly Stated," presented to the Commander-in-Chief, Sir Thomas Fairfax, the following year, which requested

> That a Committee of conscientious persons be forthwith selected to consider of the most intollerable oppressions by unjust proceedings

> in the law, that with all the lawes might be reduced to a smaller number, to be comprised in one volume in the English tongue, that every free Commoner might understand his own proceedings, that Courts might be in the respective Counties or Hundreds, that proceedings might become short and speedy, and that the numberlesse grievances in the law and Lawyers, might be redressed as soone as possible.[95]

It will be recalled that similar demands were echoed in Continental literature which preceded the French Revolution. Moreover, it has been demonstrated that much reforming and codifying legislation was enacted by the early Revolutionary Assemblies which, in general, were in sympathy with the desires of the commonalty. But this was not the case with the Long Parliament, which had no desire to alter the status quo obtaining after the abolition of Star Chamber and other prerogative courts. Nevertheless, in view of the increasing power of an army which held more radical views than the legislators, it must have been thought politic to give an appearance at least of moving in the direction of reform. In terms of the legal system, this is shown by the appointment in 1646 of two Committees headed by John Selden and comprised largely of lawyers, whose functions were to investigate procedures, offices and fees in Chancery and in several other courts and to recommend reforms.[96] Although these Committees were given the power to "send for Parties, Wittnesses [and] Records," the *Journals* are silent on their activities until 1649.

By this time, the Army had actively demonstrated its disgruntlement with many legislators by excluding them from Parliament in Prides' Purge. At the same time, the volume of critical writings had reached its peak.[97] Probably in partial response to these pressures, the 1646 groups were revived by the Rump and a similar Committee was set up to investigate and report on the laws.[98] Although resolutions formulated by the former were subsequently introduced in the House, no substantive legislation resulted. On the other hand, the Rump Committee must have been quickly forgotten because eight months later, in June, 1650, yet another Committee consisting of "all the lawyers of the House" and a few laymen was formed and instructed "to revise all former Statutes and Ordinances now in force" and advise "as how the same may be reduced into a more compendious Way, and exact Method, for the more Ease and clearer Understanding of People. . . ."[99] Again, the record is silent concerning the subsequent activities of this group.

It would appear, however, that the external pressures were beginning to force concessions from the legislature, for Cobbett's Parliamentary History informs us that

> A motion had been made in the house for converting the law into English; and accordingly this day [November 8, 1650], the lord commissioner Whitelocke brought in a bill "For turning the Books of Law and all Process and Proceedings therein, into English;" which was read a first and second time, and committed. On the 22d, the said bill was read a third time and passed.[100]

Considering the past record of Parliament in legal reform, this was a noteworthy accomplishment, achieved with almost phenomenal speed. In fact, it is so unusual that the circumstances which surround it deserve examination. The bill originated in a resolution of October 22 "That this House do take into Consideration the Regulation of the Proceedings of the Laws, and of all Delays and Charges in Courts of Justice; as also of all exorbitant Fees, and other Grievances, for the better Ease and Benefit of the People . . . ."[101] Three days later, after the debate, the original objective had been broadened, or diffused, and then compartmented. In four separate clauses it was resolved that all laws be translated into English, and English be the language of the courts;

that salaries of judges be set and certain and court offices and fees be abolished; that delays and unnecessary charges in legal proceedings be remedied, and that the laws be reviewed to establish which should be repealed.[102] All in all, here was a programme which would have satisfied most, if not all, complaints if it had been implemented. But simultaneously, the Rump also appointed a new Committee composed largely of legalists to draft bills which would implement its directives.[103] In the event, a bill to give effect to the first resolution was introduced on November 8 and enacted a week later. But nothing more was heard of the determination of legal salaries, the abolition of court offices, the reduction of delay in procedure, or the ordering of the statutes. Moreover, even the Act itself must be viewed with some suspicion. There could not be compliance with its provisions overnight because, as the law was written French or Latin, it would have to be used in its original form until rewritten in an authoritative translation. This being the case there might never be compliance, for it may be recalled that the similar legislation of Edward III had been wholly circumvented by the legal profession. Moreover, of all the resolutions the Committee had to deal with, it was the only one which would immediately and substantially increase the income of the legal profession, since all relevant "Report Books . . . and other Books of the Law of England" were ordered to be translated into English, and the only persons who could understand law-French and court hand were the lawyers.[104] It comes as no surprise, therefore, to learn that the use of Latin and law-French in the courts was restored in 1660.[105]

After this brief flurry of activity law reform was shelved for the time being. But it must have been evident to the Rump that it could not ignore the problem indefinitely for, in addition to the continuing flow of critical pamphlet literature, Hobbes's Leviathan appeared in the summer of 1651, with its explicit criticism of the common law, lawyers in general and Sir Edward Coke in particular.[106] Moreover, while radicalism in the Army had been muted, it had not been stilled. In any case and for whatever reason, in December of that year the legislators appointed yet another Parliamentary Law Committee on which legalists were strongly represented.[107] This body, in turn, was to nominate a second group from "out of the House," whose function it would be to draft comprehensive proposals for law reform. After the Rump had sanctioned the nominations, what is now known as the Hale Commission came into being.[108] By dint of hard work over a six-month period, it produced sixteen bills covering a wide spectrum, which came to be known as "The System of Laws." These were then taken up by the parent Committee. But whereas the Hale Commission had been expeditious, the legislators were tortuously slow. In debates on the bill concerning registration of land titles, for example, a clause stipulated that if a sale of property were registered within the period laid down, "that land should not be subject to any incumbrance: this word 'incumbrance' was so managed by the lawyers, that it took up three months time before it could be ascertained by the committee."[109] In view of such dilatory tactics, it is not surprising that none of the Commission's bills received the sanction of the Rump. However, with the advent of the Barebones Parliament, which was more attuned to the wishes of the commonalty, the prospect of legal reform and codification to make law "easy, plain and short," looked distinctly promising. All the Hale Commission reports were reprinted and it is evident from the Journals that the legislators were working with unaccustomed speed.[110] But their efforts were in vain, because the assembly was brought to a premature end by procedural trickery.[111]

In spite of this setback, the advocates of statute reform, prominent among them Oliver Cromwell, persisted.[112] On three subsequent occasions Parliamentary committees composed largely of the "Gentlemen of the Long Robe," were struck specifically to recommend measures to reduce and order the statutes.[113] The last was convened in 1666, probably at the instigation of Lord Chancellor Clarendon, since the initiative came from the House of Lords. These bodies were as barren of results as had been their predecessors. At this point, for all practical purposes, the attempt to systematize statute law, or any part of it, came to a halt for over a century.

To sum up: the throne speech of Thomas More in 1529 was the first occasion on which a Lord Chancellor is recorded as telling Parliament that it had been convened, in part, to reform the statutes. In at least eleven subsequent throne speeches his successors, or the monarch himself, repeated the substance of More's remarks. In response to these exhortations and to other pressures, the Journals of the House of Commons reveal that, over a period of one hundred and twenty years, at least fifteen legislative committees were convened to systematize part or all of the statute law and that four bills to effect this end were introduced, the first of which is recorded on the second page of the first volume in 1547. Furthermore, these statistics do not take into account the several private reports and bills commissioned by various Lord Chancellors, which gave the Commons' committees much data with which to begin their deliberations.

After recording this dismal litany of failure, it is a fair question to ask why all efforts to order the statutes--some variant of codification with or without substantive reform--had consistently come to grief in Parliament since the time of Henry VIII. From all the evidence it would appear that the legal profession, as embodied by its representatives in the legislature, had consistently and successfully opposed such measures within the context of their similar opposition to any major change in the common law system. This is not to suggest, of course, that there was any concerted plan to do this; rather, it is suggested that it was an unspoken--perhaps unconscious--consensus, which was a product as much of their training and consequent attitude of mind as of the expected ramifications of any such change. That is to say, if a major reform were legislated, then a precedent, a word pregnant with meaning for lawyers, would be set for subsequent statutory interference in their settled and orderly professional existence. But quite apart from this general opposition to change, there was an immediate and tactical reason for the resistance to codification measures toward the end of the period. Any large reform would necessarily involve repeal of a substantial number of statutes. Thus, the source of much of the ammunition Parliament used with such great effect against the King's Government would be depleted. In short, who could tell, before the question arose, which Act would provide the precedent to clinch the argument for the opposition?

Before analyzing the evidence to support this hypothesis, it would be a useful exercise to distinguish the various interests which attempted to bring about law reform and to isolate the objectives they hoped to achieve. It may seem obvious to point out that such reform could occur only in Parliament, regardless of who made the proposal, or his reasons for doing so. But recognition of this fact makes it clear that the first and fundamental division is between those who were members of Parliament and those who were not, between those who could introduce and influence legislation directly and those who could hope only to influence the legislators. This latter group was large and had diverse aims. There were, for example, academic writers such as Thomas Starkey and Richard Morrison who had the ear of a senior politician and could thus hope to see their recommendations concerning the laws and the legal profession translated into legislation. Another group which had the possibility of realizing particularized requests for reform were the petitioners of 1534, whose cause was looked at with some interest by Henry VIII. Then there were men such as Thomas More, Holinshed and Ben Jonson who, by exposing faults all over the legal canvas in their fictional, historical and dramatic writings, implicitly made the case for reform. While such works informed and influenced public opinion, they do not appear to have had many partisans among the politicians. Finally, there were the lay writers, particularly during the Civil War period, whose pamphlets and tracts criticized every aspect of the legal system and offered innumerable reform proposals. However, these were written in a void, so to speak, because, excepting some members of the Barebones Parliament, there were few legislators who were in sympathy with either the writers or their plans.

On the other hand, with the exception of the individuals who moved the few resolutions for comprehensive changes in the Civil War period, the men who pushed for reform in Parliament comprised a small and select group, with limited and specific aims. Apart from James I who spoke for himself, the prime movers in most instances were the Lord Chancellors, their senior officers, or privy councillors. Their legislative objective, as opposed to what they may have advocated in private writings, was to systematize--codify--the statute law, especially the penal portion. At this point it may be objected that it is inconsistent to argue that the lawyers were opposed to such reform, if the assertion is then made that the primary advocates of reform were the senior members of the legal hierarchy. The answer to this paradox is that the profession as a whole saw prospective reforms from the point of view of the practitioner of the law as it was. Hence, any change not initiated or sanctioned by the profession would be undesirable.[114] On the contrary: when a Lord Chancellor moved for reform, he was not motivated by the considerations of the practitioner, but by the fact that he was the chief administrator of the legal system. As such, and because many of his appointees were untutored in the law, it is understandable that he should want to ease the administrative burden of his office with the aid of a systematic collection of the statutes or, failing that, at least of the penal laws, since the Crown not only had to administer the penal law, but also to assume the role of prosecutor in every criminal case.

If the Lord Chancellors initiated proposals to systematize the statutes as matters of governmental policy, how did the legal profession manage to block their initiatives for well over a century? Unfortunately, the sources which record the fact of the introduction of a bill or the formation of a committee do not contain the pith of subsequent debate on the matter. Nor is this omission made good in other available sources.[115] Nevertheless, a response to the question may be postulated, if indirect evidence is taken into account.

To begin with, legal practitioners formed not only the largest professional group in the House of Commons in the period under discussion,[116] but also by virtue of having been bred to the law in an Inn of Court before being allowed to practise, intellectually theirs was the most cohesive. They stood in sharp contrast to occupational groups such as merchants or royal officials who, while bound by common interests, were unlikely to have developed the close ties and attitudes of mind engendered in individuals who have shared a rigorous and technical education. Moreover, while available data shows that such men comprised between 15% and 17% of the membership in the Parliaments of the period, the same sources also confirm the startling rise in the total number of legislators educated at the Inns of Court. In 1529 the figure, including active practitioners, was 66 out of a membership of 310, i.e. 21%; in 1584, this figure had risen to 40% or 187 out of 468; by 1640, well over half the members were Inns of Court men: 61% or 310 out of a total of 507.[117] In the context of this argument, the significance of these numbers is that many, if not all, of these men would view proposed changes to the legal system from the common perspective of the active practitioners and would consequently tend to present a uniform front against such proposals.

Even without such aid, the active practitioners probably exercised much more influence in the House than their numbers indicate. In Henry VIII's time, the Commons sat in the Chapter House of Westminster Abbey, about one hundred and fifty yards away from the south door of Westminster Hall, which opened behind the Courts of Chancery and King's Bench. But from 1547 to 1834 their meeting place was the upper level of

St. Stephen's Chapel, which abutted the south wall of the Hall; in fact, the stairs from the lobby of the Chamber led down to the door behind the courts.[118] Hence, since Parliament met during term time, the legal members were the only persons who could, as it were, combine the business of Parliament with the practice of their profession, for as Sir John Neale points out: "They were always disappearing through the doors and down the stairs to the courts in Westminster Hall."[119] But the converse is also true. Unlike the considerable number of members who were engaged elsewhere or who had not bothered to attend the session,[120] the lawyers could be summoned quickly from the courts to Chapter House or Chamber, if some matter of concern to the profession were at issue. Once arrived, they were operating in a forum which was, to say the least, congenial to their talents, for "the standard of speaking in Elizabethan Parliaments was very high"[121] and it did not decline under the Stuarts. Prime among the eloquent and persuasive speakers were, of course, the members of the bar: Nicholas Bacon and his son come to mind in this respect, as do Sir Edward Coke and John Selden.

Another fact which exaggerated the lawyers' influence when statute reform came up for consideration was that, as we have seen when committees were struck to deal with legal matters, it was the practice of the House to select the majority if not the entire membership from the gentlemen of the long robe.[122] It follows, therefore, that one of their number would invariably be the chairman. Hence, while measures for statute reform were usually drafted by government officials and introduced by senior officers of the Crown, such a committee could revise the text to its own liking or, indeed, bring in an entirely new bill.[123] On the other hand, when a committee was formed to produce an initial draft it was possible, regardless of the material it was given to work with, to draw out the proceedings, so that Parliament was dissolved before any substantive result was achieved.

Also of importance is the fact that the business of the House was conducted by a common lawyer: all the speakers of the period, with the exception of Sir Thomas Neville in 1515 and the Rev. Francis Rous of the Barebones Parliament, were chosen from the most eminent practitioners at the bar,[124] whence they usually returned at the dissolution of a parliament.[125] As such, they were selected and elected because of their legal expertise which, as Neale points out, often enabled them to influence the disposition of a bill by resort to a variety of procedural tactics.[126]

When all this evidence is taken into account, it becomes apparent that the common lawyers in Parliament constituted an informal organization which had the power to control the progress and outcome of any measure touching the systematization of the statutes. This control must have been exercised internally and unobtrusively, since, on the one hand, mention of the first step in an initiative is usually all that is recorded in the sources, while on the other, no substantive legislation was forthcoming during the period. But occasionally there is a glimpse of lawyers in action when some other matter of concern to the profession was under consideration. The talking-out process is seen, for example, in the three-month wrangle over the meaning of the word "incumbrance" during the debate on title registration. The lawyers' power to block a measure in committee was demonstrated when the naturalization bill was under consideration. (Incidentally, it is of interest to note that the recorder of this incident regards "the lawyers" as a group apart.)

When under great pressure, as it obviously was in 1650 when a thoroughgoing reform of the legal system was in prospect, the committee of the time could be more subtle. Of the four separate parts into which the original motion had been diffused, it selected for action the measure which could most easily be circumvented and which would, in fact, be profitable to the profession in the short term and gave it unusually rapid passage. The other three were quietly consigned to limbo. Under even greater pressure from Henry VIII, after outrightly opposing his bill on uses for several years, the lawyers compromised by choosing the lesser of two evils. They voted for the statute in return for inaction on a proposal which would have had incalculable effects on the profession. And so, with such shifts and devices, they were able to block any attempt to change the legal system or to bring order to the Acts of Parliament.

After Clarendon's initiative in 1666, there is no mention of statute reform in the parliamentary journals for the next century or more, although a small pamphlet literature kept the subject before the public.[127] This lack of official interest is not surprising, for it was during these years that the distinctly Whiggish principles of government were in the process of rapid development, with the supremacy of Parliament as their cornerstone. But underlying the cornerstone were the statutes. As they stood, they constituted an inexhaustible armoury of precedents, the metaphorical weapons which had been as important in the achievement of parliamentary supremacy as had the muskets and sabres of the New Model Army. To alter them would be not only sacrilegious, but who knew when they might be needed in the future to beat back an attack on the status quo? An early exponent of this view was Francis

Whyte, the author of For the Sacred Law of the Land, who said: "Our laws are sacred, pious, good, merciful and just . . . and he must forfeit the whole reason of man who desires a change."[128] Over a century later, on the eve of the outbreak of the American Revolution, the polished sentences of Edmund Burke gave the received Whig view of Acts of Parliament:

> "I did not dare," said he, "to rub off a particle of the venerable rust that rather adorns and preserves, than destroys, the metal. It would be profanation to touch with a tool the stones which construct the sacred altar of peace. I would not violate with modern polish the ingenious and noble roughness of these truly constitutional materials. . . . What the law has said, I say."[129]

But even as Burke spoke, the winds of change had begun to blow. In terms of penal law, Beccaria's Of Crimes and Punishments had been in wide circulation for fourteen years; Of Public Wrongs, Blackstone's fourth volume, had been in print for six years, and Jeremy Bentham was about to begin his long campaign for substantive reform and codification of the law. But in a conservative institution like the legislature, the idea of far-reaching change in the law takes time to germinate and grow and no progressive reforms in terms of systematization received legislative sanction for over half a century. In the interim, however, Parliament was responsible for a measure which greatly facilitated these reforms if, indeed, it was not an absolute prerequisite for them: the publication of Statutes of the Realm.

The process began in 1800 when, in an address to the Crown respecting the public records, the House of Commons reported that in many of the important departments of state such records were

> wholly unarranged, undescribed, and unascertained; that some of them are exposed to Erasure, Alteration, and Embezzlement, and others are lodged in Places where they are daily perishing by Damp, or incurring a continual Risk of Destruction by Fire.[130]

The House requested the Crown to authorize the printing of the records and so preserve the "ancient and valuable Monuments of our History, Laws and Government." The request was granted, committees were appointed and work began. One result was the production of the Statutes of the Realm, which includes all the public general Acts passed between 1235 and 1714, as well as the Charters of the kings before Henry III. Except for the latter, all statutes which had been enacted in Latin or French were translated into English, with the original on one side and the translation on the other side of a double column page. This monumental work, which was longer than Justinian's Code and rivalled it in the span of time covered, appeared between 1811 and 1822 in eleven folio volumes.[131] Like the Code, it contained only statutory enactments, but there were differences: the Acts were in chronological order, not topical, and they were reprinted as originally published, with no additions, deletions, or amendments, and with all necessary emendations footnoted.

The significance of this work is that it made possible the eventual reduction of the mass to more manageable proportions, because it was now a simple process to determine which Acts were in force. Moreover, because the edition bore the imprimatur of the legislature, argument or litigation over the text as rendered and the text of previous unofficial editions or of the translations was unlikely.[132] Its efficacy in these respects is shown by the fact that in 1825, the year the final volume was issued, the first major consolidation of statute law was enacted, after the head of the Customs Branch had digested the essence of 452 statutes on customs law in ten bills. A separate Statute Law Revision Bill repealed the obsolete Acts.[133] This process of expurgation continued for the next forty years with or without consolidation and was virtually complete by 1863.[134] With respect to the penal law, consolidation and statute law revision occurred simultaneously.

On March 9, in the short session of 1826, Robert Peel, the Home Secretary in the Tory government of Lord Liverpool, rose in the House of Commons to introduce measures which he said would "break [the] sleep of a century."[135] They were bills to consolidate the statute law relating to larceny and to criminal procedure. The former would unite "into one statute all the enactments that exist, and are fit to be retained, relating to the crime of theft, and to offences immediately connected with theft . . . ."[136] After reintroduction, it became law in the following session, while the procedure bill received royal assent a few weeks after Peel spoke.

Of course, like most major legislative innovations, these measures did not constitute a sudden and isolated occurrence. Rather, they came as the culmination of many frustrating and abortive attempts to achieve the same ends by distinguished private members such as Sir Charles Romilly and Sir James Mackintosh.[137] However, by their very efforts they had begun to cause a change of temper in the legislators. This may be seen in the recommendations of a Select Committee in 1819 that the law of a limited class of penal offences be codified.[138] The change of temper is detectable, too, in the statement of a subsequent Committee in 1824 "That it is expedient that the Statutes relating to the Criminal Law, should be consolidated under their several heads," if it could be done "without amendment or alteration."[139] In view of this proviso, the fact that there was not only a modicum of substantive change in the bills of 1826 and in subsequent similar measures sponsored by Peel, but that they passed through both chambers with no discernible opposition and with evident approbation from both sides of the Commons,[140] it would seem that the Home Secretary had laid the groundwork carefully.

His method of procedure was to separate out all Acts of Parliament or parts thereof relating to a specific topic, in this instance larceny, and to compare their provisions. If such analysis showed an omission, it was supplied;[141] where a principle was only partly applied, it was extended.[142] The substantive portion of each Act thus scrutinized was then set down under an appropriate rubric, in the language of the original where appropriate or paraphrased, if archaic. Both indictable and summary offences were included. Where different penalties had been specified for the same offence, they were reconciled and, in a few instances, the death penalty was mitigated in favour of a lesser punishment.[143] Since an addendum to the bill referred the reader to the source of each clause,[144] it was an easy matter to compare the proposal with the original enactments in Statutes of the Realm, and so ensure that there had been no substantive change, other than that specified by the Home Secretary.[145] The draft bills were prepared by ministerial staff assisted by an eminent barrister, thus keeping costs to a minimum, and when they were ready, they were submitted to the judges of the senior benches for comment on the detail of the subject matter. Several, whom Peel named, responded with "very useful suggestions."[146] He invited the members at large to do likewise.[147] All of this information was in his speech of March 9, which began by his reference to Francis Bacon's proposal of 1616.

In fact, he quoted the Lord Chancellor's opening argument clause by clause and thus cut the ground from under any opposition by anticipating and answering all probable objections. Furthermore, he was able to improve on Bacon's answer to the objection that English laws were no more prolix or obscure than those of other jurisdictions by noting that since Bacon's time, many "foreign nations [had] condensed and simplified their laws."[148] When he said this, Peel was doubtless referring not only to the civil law jurisdictions of the Continent and the codified legislation of Louisiana, but also to the considerable number of common law jurisdictions in the United States, which had systematized their statute law prior to the date of his speech.[149] He went on to buttress his argument for consolidation with copious and relevant statistics. For those members who were curious why the Home Secretary and not a law officer was introducing such measures, he informed them that he was

> ...placed in an office which devolves upon me the duty of superintending, in many important respects, the administration of justice, which entitles me to advise the Crown as to the remission or execution of almost every sentence of the law, and which gives me daily, I might say, hourly opportunities of witnessing the practical operation of the statutes which I am attempting to simplify and amend. These considerations will probably relieve me from the charge of any unwarranted and presumptuous interference in matters which I do not comprehend.[150]

Moreover, saying this provided Peel with the opportunity to describe how expert legal aid had been employed in the drafting of his bills, to give profuse thanks to the judges for their assistance and, by implication, to suggest that the bench had given its unreserved support to the measures. And this brought him to the legal members as such, who still formed the largest professional group in the Commons--112 members or 17% of those sitting:[151]

> It is the fashion to impute to that profession an unwillingness to remove the uncertainty and obscurity of the law, from the sordid desire to benefit from its complexity. This is a calumny which I know to be unfounded; for I have never made, in the progress of this work, a single application to any member of the profession of the law, which has not been received in the spirit which becomes a

> generous mind, rising above the narrow prejudices of habit, and the paltry view of private gain . . . .[152]

Most significantly, he assured the House on several occasions that there would be little substantive change because, like Bacon, his work tended "to pruning and grafting the law, and not to ploughing up and planting it again . . . ,"[153] and he disavowed any intention to meddle with the common law.

Peel's speech was a virtuoso performance. It was cogent, logical, beautifully phrased, and well calculated to appeal to the deep-rooted conservatism of the members. But above and beyond this, it was an appeal from a non-legal member to the majority of the House who were of like standing, to assist him to put through vital legislation. At the same time, he propitiated bench and bar, the traditional source of opposition to such legislation, and so made it virtually impossible for the profession to attack either the detail or the principle of his bills. No wonder he concluded his presentation "amidst loud cheers."[154]

Peel's later performances were no less carefully planned and no less successful.[155] By the time his tenure as Home Secretary ended in 1830, well over half the criminal law had been consolidated in a manner which, allowing for the differences between the French and the British systems, was not unlike Napoleon's methodical procedure prior to the enactment of the Code civil.[156] Among the most important of Peel's Acts were those concerning procedure, larceny, malicious injuries to property, offences against the person and forgery.[157] These were relatively short pieces of legislation covering forty-five folio pages in total. But the almost mechanical technique used to draft them and the fact that each section, regardless of length, was still one interminable sentence, produced the most stultifying prose. Furthermore, much procedural matter remained embedded in substantive provisions. A fair sample is section eight of 7&8 Geo. 4, 1827, c. 30, the statute concerning malicious damage to property which, in eleven lines, replaced four redundant statutes containing a total of 171 lines, or about three folio pages:

> And be it enacted, That if any Persons, riotously and tumultuously assembled together to the Disturbance of the Public Peace, shall unlawfully and with Force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any Church or Chapel, or any Chapel for the Religious Worship of Persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any House, Stable, Coach-house, Outhouse, Warehouse, Office, Shop, Mill, Malthouse, Hop Oast, Barn, or Granary, or any Building or Erection used in carrying on any Trade or Manufacture, or any Branch thereof, or any Machinery, whether fixed or moveable, prepared for or employed in any Manufacture, or in any Branch thereof, or any Steam Engine or other Engine for sinking, draining, or working any Mine, or any Staith, Building, or Erection used in conducting the Business of any Mine, or any Bridge, Waggonway, or Trunk for conveying Minerals from any Mine, every such Offender shall be guilty of Felony, and, being convicted thereof, shall suffer Death as a Felon.[158]

Although it is mind-numbing to attempt to read and comprehend these redundant phrases and long lists of nouns, it is important to realize what a change had been wrought in the statute book and how the achievement was viewed by Peel. He took great pride in pointing out that a dozen or so short Acts, in which a modest number of substantive changes had been made, had now replaced hundreds of penal statutes enacted over the past six hundred years.[159] Given the clarity and force of his own use of English, he may not have been gratified by the phraseology of his Acts, but he was a pragmatist. He was willing to settle for a bird in the hand rather than several in the bush. He gave Parliament what it wanted in terms of continuity with the past and proposed no radical reform of words or content "for the chance of speculative and uncertain improvement."[160] In return, his bills were enacted.

Henry Brougham's were not. While he was probably the most eloquent advocate of reform in or out of the Commons, this brilliant but unpredictable and caustic polymath also had a remarkable ability to alienate everyone who did not wholly agree with his proposals. In terms of the legal system, these were radical enough, for he had long been an intimate of Jeremy Bentham and from his first days in Parliament had advocated sweeping changes in accordance with Benthamite principles.[161] In need of Brougham's continuing support, but unwilling to allow him to harangue the House from the treasury bench, Lord Grey elevated him to Lord Chancellor on the Whig accession to power in 1830. Promotion to the peerage may have deprived Brougham of his accustomed forum, but it did not prevent him from launching many reform measures from the upper chamber.

Among these was the Commission of 1833 in which he directed a group of eminent practitioners to digest the criminal statute law into one bill and the common law on the subject into another, and to recommend whether it would be expedient to combine both in a single enactment.[162] Answering this question in the affirmative in their first report, the Commissioners then proceeded to implement their recommendations.[163] The process took over ten years, during which time they made a comparative study of codified legislation from the Continent, the United States and India, and subjected English legislation to the most "thorough examination [it] has received at an official level before or since."[164] Seven more reports were submitted with the seventh (1843) and eighth (1845) being respectively a draft code of indictable offences and a procedural code, following the French model.[165] While the former would have made only a modest number of changes in the substantive law, thus incurring little change in the wording of a specific section, it would have made a decided change in the overall form of the law.[166] On 170 folio pages a systematic exposition of indictable offences and punishments was set out, in which related crimes were grouped under general chapter titles, such as "Offences against the Administration of Justice" and "Offences against Public Health"; a "Chapter of Penalties" defined forty-five specific punishments. But perhaps the most striking innovation was the form of the code. Drawing from Continental models and from codes from the common law jurisdictions of the United States, the draftsmen divided the work into consecutively numbered chapters, each of which contained numbered sections beginning at one in each chapter. Each section comprised one or more articles which were numbered independently of the first two systems, so that subsequent amendments would not disarrange the numbering of succeeding sections and chapters.[167] Furthermore, the words of enactment were omitted from all but the preamble. However, unlike the French code which was exhaustive of the penal law, the Commissioner's draft did not include offences punishable on summary conviction. From their first report, it would seem that they had intended to deal with such offences,[168] but nothing more is heard of the matter until the seventh report which mentions the omission in passing but gives no reason for it, other than to say that "it would not be desirable that such provisions should be incorporated with the crimes of a higher and more general nature."[169]

Although Brougham had long ceased to be Chancellor and was, in fact, in opposition when the draft code came out in 1843, he nevertheless introduced it in the House of Lords as a private bill the following year.[170] Later, in long and eloquent if not always politic speeches he urged the House to support the measure and so reduce the penal law to a coherent, orderly system. To no avail. Neither Lord Chancellor Lyndhurst nor learned colleagues from his own side of the chamber were impressed. In the main they objected to the inclusion of the common law in the bill, and it was given second reading only after Lyndhurst had made it clear that it would go no further in that session, but would be sent to a new commission which he would convene.[171] This was done; five reports were issued during the next five years with the fourth (1848) and the fifth (1849) containing revisions of the code of indictable offences and the procedure code, reworked and shortened, but not otherwise altered, except for a provision which abrogated the common law on the subject.[172]

When the Whigs returned to power in 1846, Lord Russell formed a ministry in which Brougham had no place. Nevertheless, he again took the initiative and introduced the indictable offences bill in the session of 1848. Since Parliament's prevailing attitude toward reform had expressed itself in the recent enforcement of an otherwise forgotten seventeenth-century statute to prevent the Chartists from presenting their monster petition to Parliament _en masse_[173] and since revolution was raging in the country which had provided the model for the legislation, it was not, perhaps, a particularly auspicious occasion. Perhaps this is the reason he did not press for its passage in that session, but urged the members to give it their attention during prorogation.[174] Lord Cottenham, Brougham's successor as Chancellor, sounded relieved at this turn of events, since the bill "related to a subject upon which many different opinions existed and one which required serious consideration."[175] Lord Campbell, a future Chief Justice and Chancellor, also sounded relieved, but he took the opportunity to remark that if Brougham "had communicated privately with the Judges, and with other persons conversant with this subject, he might have brought his Bill to something like perfection before he had submitted it to the House."[176] Brougham might have been able to take such criticism from a party colleague without visible ire, but he was not prepared to see the bill criticized by a much younger man, the earl of Powis, from the other side of the Chamber. After Powis's speech, in which he commented unfavourably on a provision in the chapter on treason, Brougham said he "rejoiced to see the earnestness and zeal with which the noble Earl had taken up this subject; but he might be allowed to observe that zeal was more valuable when it was accompanied by knowledge, than when it was dissociated from it."[177] Debate petered out soon after this exchange and nobody cheered when Brougham sat down. The bill was sent to a select committee where it remained in limbo until 1852.

In that year Lord St. Leonards, Chancellor in the short-lived administration of Lord Derby, was prevailed upon to proceed with the codification of the criminal law. To effect that end, he instructed the legal draftsman Charles Greaves and a colleague to prepare a series of separate bills based on the chapters of the Criminal Law Commisioners' drafts. Like them, the new bills were to incorporate both common and statute law; they were to be confined to indictable offences and would abrogate all common law on the subject not incorporated in the text. Lord Cranworth, who succeeded St. Leonards as Chancellor in Lord Aberdeen's coalition government in 1852, carried on the work by introducing one of the new bills in the Lords, where it was referred to a committee.[178] However, perhaps mindful of Campbell's rebuke to Brougham for not consulting the judiciary, Cranworth also sent the draft legislation to the personnel of the senior benches. However, unlike Peel who had requested only comment from the judges on the detail of his bills, Cranworth asked whether "they consider that the bringing of the whole criminal law, as far as relates to offences and their punishment, into one or more statute or statutes. . . would be a measure likely to produce benefit in the administration of criminal justice, or the reverse."[179] Their replies, which were published in Parliamentary Papers, were unanimous: they were opposed to the change. While several respondents made searching and detailed criticisms of the substance of the proposed legislation, the primary objection was, as it had been in 1844, that Parliament should not tamper with the common law. This view was epitomized by Mr. Justice Alderson, who said: "Let the Bill . . . be confined to consolidating and amending, if necessary, the statute law as to these crimes, and adding new provisions where doubts have arisen . . . but let us retain the rules and principles of the common law as they have been handed down to us from our predecessors"; also by Mr. Justice Talfourd, who argued that "to reduce unwritten law to statute is to disregard one of the greatest blessings we have for ages enjoyed in rules capable of flexible interpretation."[180] After this devastating rebuff, nothing more was heard of codification for more than twenty years.

However, criminal law was still perceived to be unsystematic; thus, moving in the direction pointed by the judiciary, Greaves was instructed to draw up legislation to consolidate the major divisions of the statute penal law. In turn, Greaves made a strong and convincing argument to the Lord Chancellor that each bill should be exhaustive of a particular branch of the law and should thus include both summary and indictable offences.[181] This was done and in 1861, in a remarkably effective speech, Solicitor-General Atherton introduced the seven measures which have since become known as Greaves's Criminal Consolidation Acts. In particular, he stressed that the bills had been drafted by experts working under the direction of a parliamentary committee; that no attempt had been made to codify the law; that there had been no interference with the common law, and that members were invited to settle in committee those provisions concerning punishments which might prove controversial.[182]

Thus, Atherton took a line which is reminiscent of Peel's approach in the 1820s and it will be observed that the wheel had also turned full circle with respect to the legislation itself. This was by design, for Greaves was of the opinion that Peel had pursued a systematic course which had "worked extremely well" in producing beneficial legislation; he therefore "determined to frame as many of the new Bills as could be in accordance with [Peel's] Acts."[183] Moreover, Greaves, like Sir Robert, was a pragmatist, for although he held "that a code of the Criminal Law embodying the unwritten as well as the written law, can be framed," he was emphatic that "it is a very different question, whether such a code could ever be passed through Parliament, and my strong impression is that it never could be so passed. Neither House of Parliament would adopt bills prepared on such a principle without examination . . . ." In the event, Greaves's Bills were all enacted with little alteration. However, since they had been drafted on the earlier model, they had the same defects and merits. On the one hand, they employed the same tedious and redundant phraseology and concentrated on particulars rather than principles. Furthermore, apart from the omission of words of enactment from all but the first section of an act, they resembled Peel's Acts in appearance also, since Greaves did not employ the technical innovations introduced by Brougham's draftsmen.[185] On the other hand, much consolidation was effected and 106 redundant statutes were abrogated. In particular, seventeen lines of Greaves's Malicious Damage to Property Act replaced a total of fifty-five lines from Peel's Act and two other repealed statutes.[186]

But if limited consolidation was still the order of the day in the Imperial Parliament of 1861, other common law jurisdictions were forging ahead with comprehensive codification projects. In 1836 Massachusetts, for example, had advanced to the forefront of the codification movement with an elegant code of all its statute law.[187] In New York, David Dudley Field and his fellow Commissioners were progressing well with the draft State penal and procedural codes.[188] Moreover, even before these were enacted, they served as the models for similar codes in several of the other States, including Georgia, where they were adopted in 1863, and California, where they came into force in 1866.[189] On the other side of the world, the Indian Penal Code was promulgated in 1861 after long gestation.[190] It was the product of two Law Commissions and the initial draft, written by Thomas Babington Macaulay in 1837, was the "first specimen of an entirely new and original method of legislative expression." But while it may have been a model code and much admired abroad, it was one of a kind and would not have seen the light of day in a self-governing dominion.[191] No Indian was employed in drafting the

Bill and no indigenous criminal law was included; it was English law, written by English legalists. Not unnaturally, this was resented by the Indian intelligentsia[192] and to add insult to injury, the bill was promulgated as law by the Legislative Council, a body of twenty men, all of whom were British and had been appointed by the Secretary of State for India or by the Governor-General.[193] One such appointee was the legal member whose duty it was to draft legislation as directed by the autocratic Council. The first incumbent under the Government Act of 1861 was the eminent legal scholar, Sir Henry Maine, who taught law at Cambridge in the 1850s.

Maine's successor in 1869 was one of his former students, James Fitzjames Stephen. Born in 1829, the son of the evangelical "Mr. Over Secretary Stephen" of the Colonial Office, he grew up with all the advantages enjoyed by the son of an upper-class literary family.[194] He did not distinguish himself academically at Eton, Cambridge, or the Inns of Court. At the time of his appointment, Stephen was a practising barrister with a large family to provide for, but with no great forensic talent.[195] He had a way with words, however, and wrote a prodigious number of editorials, reviews, articles and books.[196] While his interests were catholic, he tended to legal subjects and, as a Benthamite, to the systematization of the law.[197] On his own testimony, Stephen was the epitome of the Victorian legalist: fair and a staunch supporter of the rule of law, but uncompromising and elitist.[198] Since he was also an articulate critic of democracy and its possible ramifications, and of parliamentary government as then practised, he was admirably fitted by experience and inclination for his new appointment. He worked well in the Indian system and "left the Legislative Council breathless and staggering" with his "unprecedented labours."[199] To be precise: in just over two years Stephen was either the sole or the principal author of twenty-two major measures, including a code of criminal procedure, which were duly promulgated.[200] Considering the leisurely pace at which legislation usually proceeded through Westminster, the contrast between the two systems is at once apparent.

After returning to England in 1872, Stephen again became immersed in work at the bar and in journalism. But he concerned himself increasingly with penal legislation and especially with codification, in the hope that such employment would secure him a place on the bench and with it financial security and the opportunity to pursue his own interests.[201] Articles on codification flowed from his pen; in 1873, he was employed by the government to produce a bill on evidence; the following year he drafted the abortive Homicide Bill, and was retained by the Colonial Office to revise the recently completed draft Jamaican Criminal Code, a measure which was intended to serve as a model for all British dependencies.[202] But his major work of the period, which he also began in 1874, was his Digest of the Criminal Law, an octavo volume of 411 pages divided into six parts, forty-six chapters, and 398 articles.[203]

This work, which was three years in the writing and is now in its ninth edition, is a systematic treatment of indictable offences, both from statute and common law, and it accomplished real compression and consolidation.[204] However, its subject matter was predetermined and Stephen had a multitude of models from which to draw. For example, in its general layout and in the use of technical innovations in its structure it is not unlike the draft codes of 1843 and 1848; the fact that, unlike previous writers such as Blackstone, he did not make even a reference to summary offences, also points to the influence of Brougham's Commissioners. Similarly, the inclusion of detailed examples after most substantive articles is reminiscent of Macaulay's draft Indian Penal Code of 1837. It is emphasized that while the *Digest* was not unlike the French or German penal codes in appearance and text, it was not a code in the sense that they were. It did not constitute authority. That is to say, a barrister could not quote the text of the *Digest* to support his case; he was required instead to quote from the judgement or statute cited by the author. But all this is not to disparage Stephen's accomplishment, for the *Digest* pointed a new direction in English legal writing. Instead of attempting to enumerate particulars, he "boiled down" all the redundant material, to use his favourite expression, and reduced it to a principle. This not only cut down the bulk of the law, but also reduced much tedious repetition. Rather than quote from the *Digest*, it is better to allow Stephen to explain the method himself, in words from his "Penal Code":

> I will take a section from an Act of Parliament in the exact words in which it stands and then I will give its meaning in other words, which I say are identically the same, only that they are arranged in a different manner. . . .[205]

He then quotes section 11 of the Malicious Damage to Properties Act of 1861:

> If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish or pull down or destroy, or begin to demolish, pull down or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or

> ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement.

The section is set out in seventeen folio lines of print, and contains 276 words.

Here is the same section expressed in a different manner:

> All persons are guilty of felony, and on conviction are liable to penal servitude for life as a maximum punishment, who being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, or pull down, or destroy any of the buildings,[1] public buildings,[2] machinery,[3] or mining plant[4] mentioned in the notes hereto, or begin to do so.

This runs to sixty-four words; the notes define the various types of building and machinery specified in the 1861 Act. However:

> The meaning of these two statements is identically the same . . . but the one is perfectly clear and can be understood in a moment; the other leaves on the mind only a confused impression of a multitude of words. The difference between the two is as follows: -In the one the verb follows the nominative case. "Every one commits felony who,"&c. In the other the mind is kept in suspense till the end of an interminable sentence before it learns what is to be the consequence if persons riotously assembled do any one of a vast number of things specified. . . . The shorter form has the advantage of suggesting to the mind the possibility of dispensing with the notes altogether, reading "building" for "buildings," and striking out the words "of the," "public buildings," and "mentioned in the notes hereto."

The section is thus reduced to fifty-five words or less than 20% of the original. Hence, the successive operations of Peel, Greaves and Stephen had reduced seven statutes with a total of 226 lines, between four and five folio pages, to four lines of print, and the principle had been laid down that it was an offence to destroy any building, machinery or mining plant. Stephen was equally succinct when he coined his definitions from the common law. For example, he reduced many pages of description and explanation in judgements and books of practice to one line of print, when he defined homicide as "the killing of a human being by a human being."[206]

"A Penal Code" came out in March, 1877, and was, in fact, an edited version of a speech given by Stephen to the Trade Union Congress (TUC) in February.[207] Lord Coleridge, Chief Justice of Common Pleas, was in the chair and there were many distinguished legalists and politicians present in the audience, which gave him loud cheers on the conclusion of his remarks. The event was reported in The Times the next day in a long and favourable article and was further broadcast two days later in The Law Times.[208] The latter account also included the text of a resolution urging the Government to codify the law, which was proposed and given unanimous approval after Stephen's address. Hence, in addition to the articulate and influential members of the upper classes which these publications had reached, he now had a large and approving audience among the lower classes. To complete his coverage, as it were, he sent presentation copies of the Digest to many of the more influential members of the government and nobility after it was published early in April.[209] Considering all his other activities and the fact that he had to earn a living, this was an unusual flurry of activity even for Stephen, but some light may be shed on it by his correspondence with senior legal officials.

"Sleepy Jack Holker," Attorney General in Disraeli's second administration, was an almost exact contemporary of Stephen, but he had come to prominence by a very different route. Born in 1828, the son of a manufacturer in an obscure Midlands cotton town, he attended the local grammar school, went on to article for a county solicitor and eventually was entered at Gray's Inn. Characterized by his biographer as "a tall lumbering Lancashire man . . . somewhat dull but altogether honest," he was, unlike Stephen, an accomplished advocate, his "persuasiveness, shrewdness, and tact [making] him extraordinarily successful in winning verdicts," and enabling him to earn, in his best years, upwards of twenty thousand pounds per annum.[210] Prior to his appointment as Attorney-General in 1875, Holker had become interested in the abortive Homicide Bill and had redrawn the measure. Correspondence with Stephen followed[211] and a friendship evidently developed, because Stephen rejoiced that in the Attorney-General he had secured "at least one real convert" to his codification project.[212] On January 20, 1877, Stephen sent a letter to Holker which was, in effect, a proposal for, and an outline of, a penal code.[213] However, although it would be based on his Digest, he proposed to do what the Digest could not, namely, to make many major alterations to the law. In the first paragraphs he recapitulated a previous conversation with the Attorney-General, and it is evident that he expected a sympathetic reception for a proposition which was obviously drafted for a larger audience. On March 5, after the TUC speech but just before "A Penal Code" was issued, Holker sent Stephen's proposal to Lord Chancellor Cairns with a covering letter which deserves extensive quotation:

> Private
> My Dear Lord Chancellor,
> I have good reason to believe that the question of the consolidation or codification of some portion of the law, will before long be brought before the House of Commons.
> There is a feeling in the country which is rapidly gaining

> strength that something ought to be done in this direction.
>
> Being a good deal interested in the matter myself I have lately been in communication with Sir James Stephen, who as you are aware has paid much attention to the subject, and in consequence of what has happened between us, he has addressed to me a letter containing suggestions for a measure for the amendment of the criminal law, which would be a fitting preparation for its ultimate codification . . . .
>
> If after consideration of the letter you should come to the conclusion that it will be advisable to introduce some such measure as the one suggested, I am fully convinced that Sir James Stephen would merely in consequence of the deep interest he takes in the question and not with any expectation of remuneration for his labour, afford every assistance in his power to secure the production of a satisfactory Bill, and need hardly say I would devote all my energies to the same object . . . .[214]

Cairns, a strong-minded and enigmatic man and "the first lawyer of his time" was, as Disraeli's chief political adviser, one of the most powerful Victorian Chancellors.[215] He was also an early advocate and practitioner of the systematization of the enacted law.[216] In 1868, after the expurgation of the Statute Book was virtually complete and soon after his appointment as Chancellor, he issued a Commission to publish a revised edition of the statutes containing only the Acts in force, and appointed a Statute Law Committee of senior civil servants to supervise the work and sundry other matters connected with the enacted law.[217] In 1877, the last volumes of this work were in the press. Thus, when Stephen mounted his campaign for codification, much of the tangled legislative underbrush of the previous six centuries had already been cleared away and it is likely that, far from needing to be pressured or prodded to proceed with codification--and Cairns was not the man to be coerced--he welcomed Stephen's initiative to systematize the penal law, especially si[illegible] much of it had been consolidated by Peel and Greaves. The Lord Chancellor was evidently convinced of the need for action, since he scribbled a note to himself on the back of an envelope to instruct his secretary to inform Stephen that he (Cairns) was in agreement with the Attorney-General regarding codification, and to commission Stephen to draft a penal code and a code of criminal procedure.[218]

But the Lord Chancellor did not act on his *aide-mémoire* immediately. Instead, he sent Stephen's outline to Sir Francis Reilly, the Parliamentary Draftsman, and copies to the other members of the Statute Law Committee, who would thus be able to compare the measure with a recent Report on consolidation of the penal law prepared for them by Robert S. Wright, the London barrister who had written the draft Jamaican Criminal Code.[219] Meanwhile Stephen, who may have learnt indirectly of Cairns's interest in a procedural code, sent a proposal directly to the Lord Chancellor in which he offered to amend and codify both the substantive and administrative criminal law. Unlike Holker, however, he raised the question of payment but said he would accept any remuneration Cairns considered fair, so long as his drafts would receive serious consideration, such as referral to a royal commission.[220] Two weeks later, he followed up his proposal with an eight-page printed outline of a code of procedure.[221]

Then Holker again took up his pen on Stephen's behalf. In another effective memorandum to the Lord Chancellor, he stressed the advantages which would accrue to the Government if the law were codified, making the point that Assheton Cross, the Home Secretary, thought the "codification of the criminal law . . . very desirable" and urging Cairns to allow Stephen to begin work, so as to "have the drafts settled by the commencement of the [next] session."[222] Shortly after, Reilly reported to Cairns. He had canvassed his colleagues of the Statute Law

Committee and had found that they were not enthusiastic about allowing Stephen to proceed with codification. But Reilly did recommend that Stephen be employed to make emendations to the criminal law and so take advantage of the fact that he had "certainly prepared public opinion to expect and support improvements. . . ."[223] The upshot of all this activity, and notwithstanding Reilly's recommendations, was that on August 2, Cairns commissioned Stephen "to draw a Penal Code and a Code of Criminal Procedure at once."[224] However, the letter from Treasury which authorized payment to Stephen of twelve hundred pounds--later increased to fifteen hundred guineas--stipulated that it would be made on the completion "of the three bills for consolidating and codifying the Criminal Law of this Country."[225] In accordance with past practice, and with the actual organization of the Draft Code of 1878, the third bill was undoubtedly to be a statute law revision act to repeal the enactments made redundant by the Code.[226]

Stephen set to work immediately. The result was a draft code of indictable offences, employing the economical style of the Digest. The mammoth sentences of Greaves's Acts were reduced on average to less than a quarter of their original length. More importantly, the terse definitions of crimes which Stephen had coined in the Digest were maintained and the common law was specifically abrogated.[227] Hence, if the draft code became law, homicide, rape, and robbery, for example, would be defined, for the first time, by statute. By this revolutionary means, Stephen hoped to make the law "distinct and certain" and thus reduce or eliminate the "quasi-legislative authority"[228] of the bench which allowed judges to bestow "liberal mercy . . . in the one case [and] exemplary severity in the next."[229] He completed the work early in October. Such expedition was possible because, as Stephen himself observed, "with a little alteration [the Digest of the Criminal Law] would make a Draft Penal Code."[230] A comparison of the Digest and the Draft Code of 1878 bears him out.[231]

But in effecting this transformation, Stephen either did not have the time or saw no need to make the modification that was essential if the draft code was to be read with comprehension by any person other than a legalist. A reading of any substantive article in his Digest (the draft section on riotous destruction quoted above on page 142 is a good example, as it is a copy of Article 74 of the Digest) reveals that it is essentially a statute in miniature. It defines a particular crime, classifies it as a felony or misdemeanour, and specifies the punishment. This form of construction thus obviates the necessity, if not desirability, for a "general part" in the Continental style, which defines specific classes of crime in terms of punishment. However, one of the many alterations Stephen proposed to make in the law was the abolition of the now meaningless procedural distinction between felony and misdemeanour, a laudable aim. To accomplish this, these two words were to be expunged from the legal vocabulary and their place taken by the term "indictable offence."[232] There was no intention to alter the substantive provisions of the law. All felonies and misdemeanours would be redesignated simply as indictable offences, to be subject to one and the same process. The problem was that the words "felony" and "misdemeanour" were ancient terms, widely known to and used by the general public as classes of crime differentiated by punishment in which the accused had a right to trial by jury. An indictment was merely a piece of paper on which the particulars of a specific offence were described, a detail in the administrative procedure developed to deal with crime. Knowing the legal lore implicit in the proposed change, it was not difficult for the politician who considered the legislation and for the legal professionals who would administer the system to deduce that a person charged with an indictable offence would be entitled to trial by jury. This was not clear to the lay reader. To him it appeared that what had been part of an administrative process was now something to do with the crime itself. He got no help from Stephen. Despite the fact that the term "indictable offence" was used over and over again in the bill in connection with specific crimes, it was nowhere defined. In this one instance, if in no other, the change from Digest to draft code created the necessity for a "general part," if the work was to be read with any degree of comprehension by a non-professional. Stephen did not supply that need in his submission to the Lord Chancellor.

Again, Cairns sent the draft to the Statute Law Committee requesting its observations. Furthermore, he also asked that any material on criminal law prepared for the Committee by R.S. Wright be made available to him. Hence, in a turnabout, the work of the other prominent codifier of the day was now to be used by Cairns and his law officers "as a test of the completeness and correctness" of Stephen's work.[233]

The Committee members complied with the Chancellor's request for Wright's material, but "doubt[ed] whether it [was] within their province to offer a collective opinion on the Draft Code." However, they did recommend to Cairns the observations of Sir Francis Reilly, which were appended to their memorandum.[234] Coming from one whose business it was to draft legislation which would pass into law, Reilly's remarks were cogent and to the point. In the main, he thought it inexpedient to combine large alterations in the law with codification and he was not happy with the reduction of common law to statute. His main recommendation was that any changes in the law should be the subject of a separate bill, which should be enacted prior to the code. As before, Reilly's criticism had no discernible effect on Cairns nor did Wright's work change his thinking, for Stephen continued with codification unhindered.

In the meantime Stephen kept his name and the subject in the public eye. In September, 1877, The Nineteenth Century published his "Improvement of the Law by Private Enterprise," which outlined a scheme to codify all law giving, as a starting point, a statistical outline of its bulk, both statute and reported cases.[235] "Suggestions as to the Reform of the Criminal Law," an argument for the codification of criminal procedure, appeared in the same journal in December.[236] But Stephen did not neglect his legislative drafting and, indeed, claimed to have convinced Cairns and other senior legal officers to accept an innovative change in the format of the legislation: when his draft was ready for the printer early in January, 1878, both the penal and the procedural matter had been integrated in one criminal code.[237] At that time Stephen had high hopes that the Bill would be introduced early in February. Much to his disgust, the weeks went by and no action was taken. Never one to wait on events, he went to work behind the scenes and lobbied the influential. In a letter to Lytton, for example, he recorded that he had

> . . . used all manner of arts trying on the one hand to land Stafford Northcote (who as leader of the House of Commons is the unfortunate person) by appealing to the Lord Chancellor and the Attorney General in accents something like despair, and on the other

> to stir up action in the shape of the United Trade Unions of all England, who take a deep interest in the subject, and are quite willing (to my great satisfaction) to agitate about it.[238]

All of this demonstrates that Stephen was a persuasive writer and a skilful lobbyist. But, unlike Peel, he was not attuned to political reality as manifested in the legislature, a fact he made abundantly clear in print. His "Parliamentary Government," for example, was a lucid, rational and wide-ranging critique, which compared the British system adversely to the Indian and asserted that "Parliament is ill fitted for the task of elaborating the details of legislation, especially when it is complicated and relates to special subjects. . . ."[239] He had been even more specific in "A Penal Code" when, in addressing the problem of how to prepare such legislation, he stipulated: ". . . it is a work which Parliament can no more do for itself than it could have built the house in which it sits."[240] There may have been some truth in these assertions, but it is unlikely that they would have encouraged many parliamentarians to support legislation drafted by their author. Thus, while Stephen was creating a constituency for his ideas among influential friends and the public at large, he was alienating men who held the power to implement or reject his Bill.

When, eventually, late at night on May 14, the Attorney General introduced the Bill for first reading in the Commons, his speech did nothing to improve the situation, for his style and the content and arrangement of the subject matter were strongly reminiscent of an argument by Stephen.[241] While it was a lucid and systematic exposition of the history and content of the measure, the main thrust of Holker's argument was to explain the need for change in the law and to detail the large alterations proposed by Stephen, including measures to eliminate the "irrational rules" of the common law pertaining to larceny.[242] All very true no doubt but not, on the whole, the best way to appeal either to a chamber composed largely of barristers and those charged with the administration of criminal law or to a Liberal Opposition, which venerated the common law as the foundation of Parliamentary supremacy.[243] Unlike Peel and Atherton who had followed a Baconian approach, Holker did not invite members to participate in the process, nor did he suggest that Stephen's draft should be analysed and amended by a special committee or other such body. The few Opposition back benchers who followed Holker gave the Bill a restrained welcome, although one did anticipate subsequent developments, when he remarked that "the changes proposed were of so extensive a character that they would require the gravest possible consideration. . . ."[244] Second reading, which also came on late at night, was dominated by this theme. There was general support for the measure, but since the Opposition claimed that it proposed so many large alterations in the law that the principle and detail of the Bill must be discussed in committee, the Government was pressed to give assurances that such debate would be allowed for.[245]

Obviously, the Draft Code was going to face hostile and detailed scrutiny and it is thus reasonable to suppose that the Lord Chancellor requested Sir Henry James, a prominent Liberal legal critic and Holker's successor as Attorney General in Gladstone's second administration, to canvass Opposition members for their views on the measure. In any event, James reported to Cairns that they were in favour of it, but "would like to see it sent first to some body in the nature of a Royal

Commission."[246] For his part, Stephen kept the subject before the public by responding to a leader in The Times which called for the new matter to "be pointed out for public information," with a letter to which he appended a list of the proposed changes which completely filled four columns on the editorial page.[247]

Probably as a result both of his investigations and of Stephen's activity, Cairns decided to withdraw the Bill and to form a Royal Commission consisting of Stephen and two judges to criticize and amend it for re-introduction in the next Session. He so informed the Lords and also told them that he had considered sending it to a select committee of both Houses, but had decided not to do so on the grounds that members would not have the time to give the measure their undivided attention.[248] This information was then reported to the Commons by Holker and caused a consequent shift in the focus of the Opposition. Now their primary concern was that representation on the Commission should be enlarged to include laymen who represented all orders of society. For as Sir William Harcourt, a future Home Secretary, pointed out, in such a diverse work as the criminal code which had the potential to touch the life of every individual

> . . . they must have the help of different minds; it must be looked at from various points of view, and not exclusively in a legal aspect. . . . In the present instance he would warn the Government that if they persisted in constituting a purely legal Commission they would entirely fail in the object they had in view - namely, of inducing Parliament to accept that Bill without discussion, and they would next Session be as far as they were now from any chance of passing it.[249]

But this was not news to Cairns, for the TUC had previously made the same point in a letter which also informed him that the Congress would be pleased to nominate suitable men to the Commission.[250] Cairns's response was to appoint a third judge.[251]

The Commission sat continuously from November to April 1879, during which time Stephen was appointed to the bench. His Bill was examined minutely and a large number of alterations were made; but they were mainly matters of detail and did not address the principle of the Bill.[252] Nor did the Commissioners alter its appearance or layout, other than to change "chapters" to "parts" in order to avoid the confusion which would arise if the Bill became a chapter in the statute book. The result of the Commissioners' deliberations--the Draft Code of 1879--was appended to a comprehensive report which set out the objectives of the Bill and an overview of the proposed alterations. The most interesting reading is their examination of arguments for and against codification and particularly, in the context of their recommendation to abrogate the common law, of their discussion of its alleged "flexibility" or "elasticity."[253]

Unlike first reading the previous year, the introduction of the Draft Code of 1879 turned out to be a full dress debate, in which many of the legal luminaries of both sides of the House were deployed.[254] In general, Holker reiterated what he had said previously and again laid stress on the large number of alterations the measure would effect, especially the abrogation of the common law. He concluded by telling the members that consolidation and codification could not be "properly accomplished unless the House will be content to confide the preparation of the Bill to persons who are known to be thorougly competent, and to accept the result of their labours."[255] In view of what had been said previously, the reaction to this speech was predictable: Opposition members assailed Holker from all sides, but chief among their objections was that their powers had been delegated to the Royal Commission, which was not responsible to the House.[256] There was thus a general consensus among them that the Draft Code could not be taken on trust, that, in short, they would be compelled to "go clause by clause through the Bill, and examine its minutest details."[257] In confirmation of Reilly's apprehension, several also asserted that the measure should have been confined to codification and should not have proposed changes in the law; they were dubious about the reduction of the common law to statute.[258] By no means all the comment was negative, however. Sir Henry James, for example, suggested that the Draft be separated into ten or twelve bills and dealt with as and when possible, a proposal which Holker rejected.[259] On that note debate ended. And there the matter rested until second reading, apart from the publication in The Times[260] of a memorandum of the Commissioners' proposed alterations.[261]

Since debate on second reading came on without notice, Sir Henry James took the opportunity to lead off.[262] He began by summarizing the objections of the Opposition, while making it clear that the Liberal argument had been broadened and made more precise. Specifically, James stated that he was opposed to the abrogation of the common law and that the Bill was incomplete, since it did not codify all of the criminal law.[263] His colleagues then began to repeat their earlier arguments and it is clear that their chief concern was still that the Bill had been drafted by a body outside Parliamentary control and would therefore require detailed and critical examination. In an obvious attempt to pour oil on the troubled waters, the Solicitor General hastened to assure Opposition members that they would have every opportunity to examine the measure and to institute changes. He then drifted into a discussion of some matters of detail.[264] However, he was unsuccessful in muting the Liberal message which was epitomized in the words of Farrar Hershell, a future Lord Chancellor:

> It was no use thinking that the Bill would pass through the House without considerable discussion . . . and unless they had taken that into account he warned them that they had better abandon the Bill for the present year rather than waste time discussing it.[265]

Then Holker took the floor to wind up the debate. If any gains had been made by the Solicitor General, they were lost by the Attorney General. His speech was a shortened and more conciliatory address than he had made previously, but his position was unchanged. In particular, his faith in the Commissioners was unshaken, and it was still his opinion that ". . . the House will do well to take the plain draft which has been very carefully prepared by persons most competent to deal with it."[266] In short, it would seem that the Government had pressed ahead with its own plan, unmodified by the advice of the Opposition and, as Harcourt had predicted, it was thus no nearer to getting the Code through Parliament than it had been the previous year. Moreover, any lingering hope Holker might have entertained was extinguished by a long and detailed letter he received from the Lord Chief Justice of England.

Sir Alexander Cockburn had been Lord Chancellor Cranworth's Attorney General in 1854, when the judges' replies to the Chancellor's circular had put an end to the codification project of that era. He was thus in a position to know how effective the judicial objections had been. Like that of his earlier brethren, his criticism was lengthy and detailed. But his chief objection to the Bill was an elaboration of James's complaint that it was incomplete and, especially, that summary offences had been omitted.[267] There was a major difference between the two events, however: whereas the earlier bench had responded to an official query, Cockburn's letter was gratuitous. Nevertheless, it appears to have been just as devastating to the Government's hopes as had the earlier missives, for it immediately received wide publicity,[268] after which Holker informed Stephen that the Bill would be withdrawn and reintroduced the following Session. In the meantime, he proposed a meeting with Stephen to discuss Cockburn's opposition and any further actions the Chief Justice might have taken.[269]

What was said at that meeting has not been discovered. But it is apparent that the Attorney General suffered a sea-change during this period. Perhaps he did some historical reading; possibly he analysed past events, or he may have received and acted on advice from someone other than Stephen. Whatever happened, it caused him to change his tactics and ~~style, t~~o act, in short, like the persuasive, shrewd and tactful man described by his biographer. On February 6, 1880, the day after the Session began, Holker moved first reading which was agreed to without debate. When second reading came on two weeks later, he was the personification of tact and diplomacy. He assured the House that the Government was anxious to receive from all interested members criticism and suggestions concerning the Bill. He thanked specifically Lord Chief Justice Cockburn and a Mr. Gorst ~~for~~ their most welcome observations.[270] In a complete reversal of former policy, he informed the House that after second reading the Draft Code would be sent to a select committee with a large and varied membership which, if the members agreed, would have the power to divide the measure into several smaller bills, if such action would ensure safe and uncontroversial passage.[271]

Sir Henry James led off for the Opposition. After first getting it on the record that the Government had accepted the sensible suggestions from his side of the House, James congratulated Holker on his change of attitude and it seemed that there was plain sailing ahead.[272] This was an illusion, for the Code disappeared for good when the Government foundered on the rock of the Irish Question a fortnight later.[273]

Given that the public was well prepared for the introduction of the Draft Codes of 1878 and 1879 and was generally well disposed to them, why did they fail?[274] So far as the Opposition and Sir Alexander Cockburn were concerned, the immediate reasons were that the Draft Codes were incomplete, that they would abrogate the common law and that their authors had proposed large alterations in the law, about which Parliament had not been consulted. But perhaps a more fundamental reason was the attitude of the Government, as exemplified by the Attorney General. Instead of seeking the accommodation of the Liberals on the questions at issue, Holker abandoned the courtesy and tact for which he had been famous in the courtroom and, adopting Stephen's arbitrary attitude, attempted to browbeat the Opposition for two years or more. He insisted on elaborating the principle that change was necessary and was to be effectd by measures conceived and drafted outside Parliament; he stressed the fact that the measures would abrogate the common law, and he refused to submit them to a special committee for analysis and amendment. When he finally adopted the Baconian approach, it was too late.

NOTES TO CHAPTER V

[1] Plucknett, Concise History, pp. 268, 347.

[2] Ibid., pp. 268-69, 280.

[3] Kiralfy, Historical Introduction, p. 273.

[4] Ibid., p. 274.

[5] SOR, I, xxi.

[6] Loc. cit.

[7] Loc. cit.

[8] See the Table of Variances in Edgar, Chronological Tables, pp. 1-6.

[9] See SOR, I, xxv for the whole story.

[10] Allen, Law in the Making, p. 441.

[11] Holdsworth, HEL, V, 413; VI, 412; Charles Ogilvie, The King's Government and the Common Law 1471-1641 (Oxford: Basil Blackwell, 1958), pp. 18-20.

[12] Thomas More, Utopia, ed. J. Churton Collins (Oxford: Clarendon Press, 1963), p. 105.

[13] Ibid., p. 35. The practice probably continued under the later Tudors and became a settled policy of the early Stuarts; Wallace Notestein, The House of Commons 1604-1610 (London: Yale University Press, 1971), p. 51.

[14] More, Utopia, pp. 105-06.

[15] Ibid., p. xxiii; Holdsworth, HEL, V, 223.

[16] Cobbett, Parliamentary History, I, 491.

[17] Geoffrey Elton, Reform and Renewal (Cambridge: University Press, 1973), pp. 159-60.

[18] Geoffrey Elton, "Reform by Statute," Proceedings of the British Academy (London: Oxford University Press, 1970), LIV, 188.

[19] Ibid., p. 177.

[20] Ibid., pp. 179, 182.

[21] Holdsworth, HEL, IV, 455.

[22] Quoted in Holdsworth, HEL IV, 454. The emendations in square brackets are Holdsworth's.

[23] For an explanation of how this occurred, see Desmond Brown, "Historical Perspective on the Statute of Uses," Manitoba Law Journal, 9 (1979), 423-29.

[24] Holdsworth, HEL, IV, 453.

[25] For a full account see ibid., IV, 450-61; for a different view see E.W. Ives, "The Genesis of the Statute of Uses," English Historical Review, 325 (1967), 673-97.

[26] Charles Williams, ed. English Historical Documents (London: Eyre & Spottiswoode, 1967), V, 564, 568.

[27] Ibid., pp. 562-63.

[28] Robert Titler, Nicholas Bacon (Athens, Ohio: University Press, 1976), p. 3.

[29] Williams, Historical Documents, V, 562. Prior to the Reformation, graduates in civil and canon law from Oxford and Cambridge were usually chosen for diplomatic appointments and missions. But as a consequence of that momentous event, canon law ceased to be taught and the study of civil law suffered accordingly. Henry attempted to overcome this deficiency by appointing professors of civil law at both universities, but with little success (Holdsworth, HEL, IV, 230-34). It may be, therefore, that the proposal to add instruction in diplomacy to the common law curriculum was to be a further measure to fill this need.

[30] Williams, Historical Documents, V, 564-68; John Zane, "The Five Ages of the Bench and Bar of England," Select Essays, I, 683-84.

[31] Williams, Historical Documents, pp. 568, 569-73.

[32] Titler, Nicholas Bacon, p. 30.

[33] Cobbett, Parliamentary History, I, 550.

[34] Ibid., I, 582.

[35] Great Britain, Parliament, House of Commons, Journals of the House of Commons, I, 2; hereafter cited as CJ.

[36] Loc. cit.

[37] CJ, I, 5, 8, 10.

[38] Great Britain, Parliament, House of Lords, Journals of the House of Lords, I, 351-52; hereafter cited as LJ.

[39] W.K. Jordan, The Chronicle and Political Papers of King Edward VI (Ithaca, N.Y.: Cornell University Press, 1966), p. 166.

[40] CJ, I, 44.

[41] Loc. cit.

[42] Cobbett, Parliamentary History, I, 639.

[43] Stanley Bindoff, "The Making of the Statute of Artificers," Elizabethan Government and Society (London: Athlone Press, 1961), pp. 85-86.

[44] Ibid., p. 44.

[45] Cobbett, Parliamentary History, I, 679.

[46] Ibid., I, 723, see also 775-76.

[47] SOR, I, xxxi. SOR gives the year as "1557" but this is, of course, incorrect; it should be 1575. See Great Britain, Public Record Office, Calendar of State Papers, Domestic Series I, 501, December 29, 1575.

[48] SOR, I, xxxi.

[49] Cobbett, Parliamentary History, I, 859, 894, 906.

[50] Simonds D'Ewes, A Compleat Journal of the Votes, Speeches and Debates, Both of the House of Lords and House of Commons (London: 1618), pp. 345, 553, 662.

[51] Holdsworth, HEL, IV, 97.

[52] D'Ewes, Journal, pp. 345, 662.

[53] Ibid., p. 662.

[54] Richard Grafton, Grafton's Chronicle: or History of England (London, 1809) I, 160. Dictionary of National Biography, ed. Leslie Stephen (London: Smith, Elder & Co., 1908), VIII, 312; hereafter cited as DNB.

[55] Ibid., I, 403; 1326, 36 Edw. 3, st. I, c. 15.

[56] Ogilvie, King's Government, p. 18; Holdsworth, HEL, VI. 571. It is worthy of note in passing that the Church ceased to use Latin publicly in the sixteenth century.

[57] Raphael Holinshed, Holinshed's Chronicles (1807; rpt. New York: AMS Press, 1965), I, 167. The work was first published in 1578.

[58] Ibid., I, 304.

[59] Loc. cit.

[60] I am indebted to Professor Linda Woodbridge of the English

Department, University of Alberta, for allowing me to quote from a manuscript in preparation.

[61] Loc. cit.

[62] James Spedding, ed., The Letters and the Life of Francis Bacon (London: Longman Green, 1861), I, 2.

[63] D'Ewes, Journal, p. 473; Spedding, Life, I, 214.

[64] James Spedding, ed., The Works of Francis Bacon (Boston, Mass.: Houghton, Mifflin & Co., 1857) XIV, 172.

[65] Ibid., XIV, 175.

[66] CJ, I, 152.

[67] Loc. cit.

[68] Ibid., I, 359, 362.

[69] Spedding, Life, III, 219-34, 303-46.

[70] Samuel Gardiner, Parliamentary Debates in 1610 (London: Camden Society, 1862), p. 8.

[71] Elizabeth Foster, Proceedings in Parliament, 1610 (London: Yale University Press, 1966), I, 9.

[72] Gardiner, Debates 1610, p. 8, Note C.

[73] CJ, I, 470; Spedding, Life, V, 41.

[74] CJ, I, 475.

[75] Ibid., I, 519-20.

[76] Edward Coke, The Fourth Part of the Reports of Sir Edward Coke, ed. J. Thomas and J. Fraser (London, 1826), II, v.

[77] Ibid., ix.

[78] Loc. cit.

[79] Spedding, Life, VI, 64.

[80] Ibid., VI, 68-71.

[81] Ibid., VI, 71.

[82] Ibid., VI, 67.

[83] Loc. cit.

[84] Loc. cit.

[85] CJ, I, 422.

[86] Thomas Birch, The Court and Times of James I (London, 1848), I, 117.

[87] Ibid., I, 124.

[88] Ibid., I, 129.

[89] For detail see Ogilvie, King's Government, pp. 156-59, 168; G.M. Trevelyan, Illustrated English Social History (London: Longman Green & Co., 1950), II, 103-05.

[90] LJ, IV, 159.

[91] Cobbett, Parliamentary History, II, 958.

[92] Ogilvie, King's Government, p. 165.

[93] George Thomason, Catalogue of the Pamphlets, Books, Newspapers and Manuscripts Relating to the Civil War, the Commonwealth and the Restoration (1908; rpt. Nendeln, Liechenstein: Kraus Reprint, 1969), I, xxi. In passing, it is ironic to learn that the publication of such works was made possible initially by the abolition of Star Chamber, a prime function of which had been to make and enforce stringent press regulations.

[94] Don Wolf, Leveller Manifestos of the Puritan Revolution (London: Thomas Nelson, 1944), pp. 113-14, 124-25.

[95] Ibid., p. 216.

[96] CJ, IV, 701.

[97] Thomason, Catalogue, I, xxi.

[98] CJ, VI, 280, 318, 328.

[99] Ibid., VI, 427.

[100] Cobbett, Parliamentary History, III, 1358.

[101] CJ, VI, 485.

[102] Ibid., VI, 488.

[103] The Committee was constituted of twelve barristers, six members who had been educated at the Inns of Court, five laymen, and five whose education cannot be ascertained. Biographical details were found in DNB and in Douglas Brunton and D.H. Pennington, Members of the Long Parliament (London: George Allen & Unwin, 1954).

[104] Great Britain, Statutes of the Commonwealth, Act for Turning the Books of the Law into English, November 22, 1650.

[105] For discussion, see R. Robinson, "Anticipations under the Commonwealth of Changes in the Law," Select Essays, I, 480-81. See also William Blackstone's interesting but ingenuous defence of law-French and Latin: Commentaries, III, 317-21.

[106] Thomas Hobbes, Leviathan, ed. C.B. Macpherson (Harmondsworth, Middlesex: Pelican, 1968), pp. 315-17.

[107] CJ VII, 58.

[108] The composition of the Commission was as follows: eight barristers, one attorney, six men educated at the Inns of Court and six laymen. Donald Veall, The Popular Movement for Law Reform (Oxford: Clarendon Press, 1970), pp. 80-83. See also Mary Cottrell, "Interregnum Law Reform: the Hale Commission of 1652," English Historical Review, 83 (1968), pp. 690-96 for a discussion of the two groups, i.e. the Parliamentary Committee and the Hale Commission, and the influence of the lawyers on the Commission's deliberations.

[109] C.H. Firth, ed. The Memoirs of Edmund Ludlow (Oxford: Clarendon Press, 1894), I, 334.

[110] CJ VII, 284, 305.

[111] Godfrey Davies, The Early Stuarts (Oxford: Clarendon Press, 1959), p. 175.

[112] In a speech to the Parliament of 1656, Cromwell stated that ". . . there is one general Grievance in the nation. It is the Law. Not that the Laws are a grievance; but there are laws that are; and the great grievance lies in the execution and administration." Thomas Carlyle, ed., Oliver Cromwell's Letters and Speeches (London: J.M. Dent, 1907), III, 171. Consideration of the problem was a continuing preoccupation of the Lord Protector, for in 1650, he had confided to Ludlow that it was his intention to "make a thorow reformation of the clergy and law" but, significantly, he admitted that "'the sons of Zeruiah are too strong for us' and we cannot mention the reformation of the law, but they presently cry out, we design to destroy propriety [sic]: whereas the law, as it is now constituted, serves only to maintain the lawyers, and to encourage the rich to oppress the poor . . . ." Firth, Ludlow, I, 246. Cromwell also confirmed publicly Ludlow's account of the three months' debate on the meaning of "incumbrance"; Carlyle, Letters, III, 265.

[113] CJ VII, 429, 744; VIII, 631.

[114] See the instructive discussion on this point in Halevy's Radicalism, pp. 76-80.

[115] The most comprehensive record to come to hand of the formation of a committee to order the statutes is the collection of remarks made

by those who spoke on the subject on February 13, 1621. While illuminating, these are fragmentary and there is no record of further deliberations. Wallace Notestein, Commons Debates 1621 (New Haven: Yale University Press, 1935), II, 64, 72-73: V, 9, 10, 455-56.

[116] A legal practitioner in this context is defined to be an individual who had been called to the bar and was practicing his profession as a barrister, recorder or in a similar capacity, or who was an officer of a court such as a prothonotary.

[117] See Appendix 1.

[118] Howard Montague, ed. The History of the King's Works (London: HMSO, 1963), I, 46, 543. See also the plan of Westminster Palace which is included with Vol. III of this work.

[119] John Neale, The Elizabethan House of Commons (London: Jonathan Cape, 1949), p. 425.

[120] Ibid., pp. 356, 413-16; Bindoff, Commons 1509-1558, I, 17.

[121] Neale, Elizabethan Commons, p. 407.

[122] For instance, it is recorded in Vol. I, p. 6 of the Common's Journal that: "The Bill for Process and Orders of the Common Law - to Mr. Moyle &c." Thomas Moyle was a distinguished barrister and a former Speaker of the House of Commons. See also Notestein, Commons 1604-1610, p. 443.

[123] Josef Redlich, The Procedure of the House of Commons, trans. Ernest Steinthal (London: Archibald Constable, 1908), II, 203.

[124] Apart from Neville and Rous, every speaker from Edmund Dudley in 1504 to Sir Harbottle Grimston in 1660 is described as a luminary of his Inn; DNB XIV, 302, et passim. See also Neale, Elizabethan Commons, p. 357.

[125] It will be recalled that the speakership was not a permanent occupation as it is today. From 1500 to 1660 very few men served as speaker in more than one Parliament. Neale, Elizabethan Commons, p. 358. See also Norman Wilding, An Encyclopedia of Parliament (London: Cassall, 1958), p. 644.

[126] Neale, Elizabethan Commons, pp. 364-56, 396.

[127] It is conveniently summarized in Barbara Shapiro, "Codification of the Laws in Seventeenth Century England," Wisconsin Law Review, 428 (1974), 459-62.

[128] Quoted in Veall, Law Reform, p. 65.

[129] Edmund Burke, The Works of the Right Honourable Edmund Burke (Oxford: University Press, 1906), II, 215.

[130] SOR, I, vii.

[131] For commentary and criticism see Richardson and Sayles, "Early Statutes," p. 540 ff: Holdsworth, HEL, IV, 310-12; Percy Winfield, The Chief Sources of English Legal History (New York: Burt Franklin, 1925), pp. 92-95.

[132] Holdsworth, HEL, XI, 428.

[133] 1825, 6 Geo. 4, cc 104, 106-115. For details see Ilbert, Legislative Methods, p. 50.

[134] Ibid., pp. 60-61.

[135] Great Britain, House of Commons, Hansard, March 9, 1826, col. 1218; hereafter cited as Hansard.

[136] Loc. cit.

[137] For an extensive coverage of the period, complete with biographical sketches, see Radzinowicz, HECL, I, 301-449, 497-607.

[138] Great Britain, House of Commons, Parliamentary Papers, Report from the Select Committee on Criminal Laws, 1819 (585), VIII, 3. Hereafter the preamble is cited as Parl. Pap.

[139] Parl. pap., Report from the Select Committee on the Criminal Law of England, 1824 (205), IV, 3.

[140] In all, twenty-three members are recorded as having spoken in 1827 in this and subsequent debates on criminal law consolidation. All approved the bills in principle and most were laudatory. Hansard, March 9, 1826, cols. 1240-44; February 22, 1827, cols. 642-46; March 13, 1827, cols. 1161-62; May 18, 1827, cols. 937-39.

[141] For example, it was not an offence to rob a furnished house which one had rented, whereas it was "a very serious offence to rob a ready-furnished lodging." Peel's bill covered both cases. Hansard, March 9, 1826, col. 1223.

[142] There were twenty or more Acts "relating to the preservation of [several species] of trees from theft or wilful injury." Peel proposed to protect all trees with a general statement of the principle. Ibid., col. 1220.

[143] Ibid., col. 1225. It should be noted that it is in this period that the essential distinction between felony and misdemeanour began to be blurred; i.e., when transportation, or lesser punishment was substituted as the punishment for committing a felony, but the crime itself was not reclassified as a misdemeanour or lesser offence.

[144] Hansard, June 13, 1827, col. 1261.

[145] Peel was prescient in this respect, for as Lord Chancellor

Jowitt has pointed out: "Parliament was rightly jealous of any attempt to make even the smallest amendment without its knowledge and consent." Thus, efforts to consolidate the law came to a halt for several years after the Commons discovered that minor amendments which had not been published to the members had been made to the Post Office Consolidation Bill of 1897. W.A. Jowitt, Statute Law Revision and Consolidation (Birmingham: University of Birmingham, 1951), pp. 10, 16.

[146] Hansard, March 9, 1826, col. 1238.

[147] Ibid., col. 1244. In the next session, Peel asked the members not to give a blind opinion: "on the contrary, he wished and expected that the honourable gentlemen would reserve to themselves the power of expressing an opinion on a subject of such vital importance." Ibid., February 22, 1827, col. 634.

[148] Ibid., col. 1216.

[149] Of the thirteen founding states, only five had not systematized their enacted law by 1826. In Massachusetts, for example, at least ten revisions had been issued, the earliest dating from 1641 and the latest, 1823. The latter work, The General Laws of Massachusetts, in two volumes, had been edited and rewritten and was arranged topically with a comprehensive index (Howard Stebbins, "Outline of Massachusetts Statute Law Publications," Law Library Journal, 20 (1927), 72-77). Not long after Peel spoke, New York legislators enacted a major revision of the statute law which had been in preparation since 1824 and which superceded three previous revisions of 1789, 1800, and 1813. The revised edition of 1828 came out in three volumes and, as in Massachusetts, had been rewritten following a topical arrangement (McKinney's Consolidated Laws of New York (St. Paul, Minn.: West Publishing, 1971), vii-ix). Apart from the numerous articles on codification in current journals (for citations to such articles see Radzinowicz, HECL, I, 577), a direct source of information for Peel on codification was Anthony Hammond, whom he employed to draft consolidating legislation. Hammond, who was one of the experts consulted by the New York Commissioners, had published several works on codification, including several draft codes, and had written virtually all of the Report of the Criminal Law Commission of 1824, in which there were copious references to the enacted codes of the civil law jurisdictions of the Continent and Louisiana (loc. cit.).

[150] Hansard, March 9, 1826, col. 1237.

[151] Gerrit Judd, Members of Parliament 1734-1832 (New Haven: Yale University Press, 1955), p. 88.

[152] Hansard, March 9, 1826, col. 1239.

[153] Ibid., col. 1239; see also cols. 1217, 1240; February 22, 1827, col. 633; March 13, 1827, col. 1155.

[154] Ibid., March 9, 1826, col. 1239.

[155] See, for example, Ibid., February 22, 1827, cols. 632-42; March 13, 1827, cols. 1155-62; May 18, 1827, cols. 934-37.

[156] See above, Chapter 3, Note 82.

[157] Concerning procedure, 1826, 7 Geo. 4, c. 64; 1827, 7&8 Geo. 4, c. 28; concerning larceny, 1827, 7&8 Geo. 4, c. 29; malicious damage to property, 1827, 7&8 Geo. 4, c. 30; offences against the person, 1828, 9 Geo. 4, c. 31; concerning forgery, 1830, 1 Will. 4, c. 66. Over two hundred Statutes were repealed by these Acts and by the Statute Law Revision Act, 1827, 7&8 Geo. 4, c. 27.

[158] The Statutes section 8 replaced were: 1714, 1 Geo. 1, stat. 2, c. 5, ss. 4, 6; 1739, 13 Geo. 2, c. 21; 1801, 41 Geo. 3, c. 24; 1816, 56 Geo. 3, c. 125. See Statute Law Revision Act, 1827, 7&8 Geo. 4, c. 27 for details.

[159] See excerpts from his speeches quoted in Radzinowicz, HECL, I, 569, n. 7.

[160] *Hansard*, March 9, col. 1239.

[161] Bowring, *Works*, X, 471, 574-76; XI, 33, 36, 61-62; DNB, III, 1356-66; Nicholas Underhill, *The Lord Chancellor* (Lavenham, Suffolk: Terance Dalton, 1978), pp. 173-77; John Eardley-Wilmot, *Lord Brougham's Acts and Bills* (London: Longman, Brown, Green, 1857), xiii-xvii.

[162] Parl. Pap., First Report on Criminal Law, 1834 (537), XXVI, 3.

[163] Loc. cit.

[164] Rupert Cross, "The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853," in *Reshaping the Criminal Law*, ed. P.R. Glazebrooke (London: n.p., 1948), p. 8. Cross gives biographical sketches of the Commissioners and discusses the legal innovations recommended by the several reports. For an informed contemporary view of the subject, see Greaves, *Consolidation Acts*, pp. vii-ix.

[165] *Hansard*, March 29, 1844, col. 1599.

[166] For example, the first five words were omitted from the wording of the first phrase of the cited clause of Peel's malicious damage to property Act (above, p. 131), and the punishment of death was mitigated to transportation in accordance with the provisions of 7&8 Geo. IV, c. 30, s. 8, and 4&5 Vic., c. 56, s. 2. Otherwise, the text was unaltered: Parl. Pap., Seventh Report on Criminal Law, 1843 [448], XIX, 173.

[167] Ibid., pp. ii, 113-283.

[168] Parl. Pap., First Report on Criminal Law, 1834 (537), XXVI, 5.

[169] Parl. Pap., Seventh Report on Criminal Law, 1843 [448], XIX, 12.

[170] *Hansard*, March 29, 1844, cols. 1598-99.

[171] Ibid., May 13, 1844, cols. 1005-15.

[172] Parl. Pap., Fourth Report on Criminal Law, 1848 [940], XXVII, 70; Fifth Report on Criminal Law, 1849 [1100], XXI.

[173] Tumultuous petitioning, 13 Chas. II, St. I, c. 5. For details see Woodward, *Age of Reform*, p. 139 and Holdsworth, HEL, VI, 167.

[174] *Hansard*, June 22, 1848, col. 991.

[175] Loc. cit.

[176] Loc. cit.

[177] Ibid., col. 992.

[178] Greaves, *Consolidation Acts*, pp. ix-xii; review of "Copies of the Lord Chancellor's Letters to the Judges on the Criminal Law Bills of the last Session, and copies of their Answers thereto," *Edinburgh Review*, 99 (1854), 573-74.

[179] Parl. Pap., Copies of the Lord Chancellor's Letters to the Judges and of their Answers respecting the Criminal Law Bills of Last Session, 1854 [303], LIII, 392.

[180] Ibid., 399; see also pp. 394, 395, 396, and 397. For witty but penetrating criticism of the judges' views, see the review cited in Note 178 and Cross, "Abortive Bills," p.9.

[181] Greaves, *Consolidation Acts*, pp. xii, xx-xxii; Cross, "Abortive Bills," p. 10.

[182] *Hansard*, February 14, 1861, cols. 439-44.

[183] Greaves, *Consolidation Acts*, p. xxiii.

[184] Ibid., p. xii.

[185] Lord Brougham's Act, or An Act for Shortening the Language used in Acts of Parliament, 1850, 13&14 Vic., c. 21, S. 2., abolished the practice of including words of enactment in every section.

[186] 1861, 24&25 Vic., c. 97, s. 11. See above, p. 141, for text. The repealed Statutes were: 1827, 7&8 Geo. 4, c. 30, s. 8; 1841, 4&5 Vic., c. 56, s. 2; 1850, 23&24 Vic., c. 29.

[187] Stebbins, "Massachusetts Statute Publications," 76-78.

[188] George Martin, *Causes and Conflicts* (Boston: Houghton and Mifflin, 1970), p. 146.

[189] Ibid., p. 154.

[190] A.C. Patra, "Historical Introduction to the Indian Penal Code," in *Essays on the Indian Penal Code* (Bombay: N.M. Tripathi, 1962), pp. 35, 37. See also Stephen, HCL, III, 302-03, who explained Macaulay's method in detail, including the use of concrete examples to explain and demonstrate the substantive matter.

[191] The Indian system can be employed, said Sir James F. Stephen, "only where the legislative body can afford to speak its mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it *without being hampered by popular discussion*." (my emphasis) Stephen, HCL, III, 302, 304.

[192] Patra, *Indian Code*, pp. 34, 42; see also Stephen, HCL, III, 300, who makes the same points but who views the situation from a far different perspective.

[193] Government of India Act, 1861, 24&25 Vic., c. 67, ss. 2, 10. For a brief but lucid description of the system in operation see Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (London: Smith, Elder & Co., 1895), pp. 249-52.

[194] Stephen's mother was a lifelong diarist and his brother, Leslie, was the famous literary critic and editor of the *Dictionary of National Biography*. Many of the individuals whose names found a place in its pages were frequent visitors at the Stephen home. Stephen, *Life*, pp. 60-61 *et passim*.

[195] He had seven children when he left for India. His mediocre performance at the bar which, combined with his literary earnings, brought in three to four thousand pounds p.a. in his best years, is tactfully outlined by his brother (Stephen, *Life*, pp. 144-48) and stated bluntly by Leon Radzinowicz: "he never became an eminent, or even a successful barrister." *Sir James Fitzjames Stephen* (London: Bernard Quaritch, 1957), p. 7.

[196] See the bibliography of several hundred items appended to Radzinowicz, *Stephen*, pp. 49-62. This does not include his editorial output.

[197] One of the "most potent influences on his mind was Bentham," from whom "he derived the conviction that all law might, and should, be embodied in a series of brief propositions, logically arranged." Courteney Ilbert, "Sir James Stephen as a Legislator," *Law Quarterly Review*, 39 (1894), 223. See also Stephen, *Life*, pp. 123, 204, 207, 210.

[198] Stephen, *Life*, pp. 222-25, 284-88: James Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (London: Macmillan, 1983), pp. 8-9.

[199] Ilbert, "Stephen as a Legislator," p. 224.

[200] Radzinowicz, *Stephen*, pp. 54-55.

[201] In 1868 Stephen had been engaged to replace temporarily one of

the circuit judges and he remarked that it was "the very easiest work I ever did" (Stephen, *Life*, p. 232). He found a similar appointment in 1873 "throughly congenial" (Ibid., p. 343) and during a third term in 1878, he said: "I have been trying cases and prisoners just like a real judge and I like it very much . . . ." (Stephen to Lord Lytton, Viceroy of India, July 19, 1877: Stephen Papers, Cambridge University Library, Add. MSS 7349, 14/1, hereafter cited as "Stephen Papers," followed by the numerical designator of the section of the collection.) In his efforts to secure a permanent appointment, Stephen applied for the position of Recorder of London at a salary of £3000 p.a. (Ibid., Stephen to Lytton, January 30, February 15, 1878), he lobbied influential friends such as Lytton and Lord Salisbury, Secretary of State for India (Ibid., Stephen to Lytton, August 2 and 23, 1877), and he told Lytton that he had bargained for a judgeship with Lord Chancellor Cairns over the question of his (Stephen's) participation on the Criminal Code Commission of 1878 (Ibid., July 8, 1878). The appointment was well worth bargaining for: the salary of a high court judge was £5000 p.a., in contrast to his smaller and uncertain remuneration from the bar and journalism (Ibid., Stephen to Lytton, October 30, 1878). After his elevation to the bench, he wrote to his sister-in-law on January 4, 1879:

> My dearest Emily, I write to tell you that I am out of all my troubles. Cleasby [Justice of the High Court, Q.B.D.] has unexpectedly resigned, and I am to succeed him. . . . One great battle is won, and one great object attained; and now I am free to turn my mind to objects which have long occupied a great part of it, so far as my leisure will allow . . . . (quoted in Stephen, *Life*, p. 40)

On the other hand, in a letter to Lytton a few days later he said:

> . . . I hope [when] you get this that I shall not only be a judge, but shall be acting as such, instead of codifying which though it has a glamorous kind of sound is in my opinion about the hardest, the most worrying and the dullest work a poor human creature can be put to do . . . . (Stephen Papers, 14/1, February 7, 1878).

[202] Radzinowicz, *Stephen*, p. 51; Stephen, *Life*, pp. 304-06. For the interesting and informative story of the Jamaican Code, see Martin L. Friedland, "R.S. Wright's Model Criminal Code: a Forgotten Chapter in the History of the Criminal Law," *Oxford Journal of Legal Studies*, 1 (1981), 307-46.

[203] James Stephen, *A Digest of the Criminal Law*, 1st ed. (London: Macmillan, 1877), 411 pp.

[204] Some idea of the compression achieved by Stephen is given by comparing the *Digest's* 411 pages to Greaves's *Consolidation Acts*, which covered only half of the substantive law and which Greaves issued in a volume of similar size containing 453 pages.

[205] James Stephen, "A Penal Code," *Fortnightly Review*, 21 (1887), 367-69. All quotations cited are from these pages. See also Stephen, *Digest*, p. xxi.

[206] Stephen, *Digest*, art. 218, p. 138. For a discussion of the

method Stephen employed to coin such definitions, see p. xiii.

[207] Stephen, "Penal Code," p. 362, n. 1.

[208] "Codification of the Criminal Law," The Times, February 8, 1877, p. 3; "Codification of the Criminal Law," The Law Times, February 10, 1877, pp. 265-66.

[209] See, for example, the graceful note of thanks for a copy of the Digest from the Colonial Secretary, Lord Carnarvon, May 17, 1877; Stephen Papers, 15/36. Much of this section of the papers is a collection of such letters of acknowledgement.

[210] All the references to Holker are from his biography in DNB, IX, 1027-28.

[211] Holker to Stephen, January 16, 1875, Stephen Papers, 14/1.

[212] Quoted in Stephen, Life, p. 380.

[213] Stephen to Holker, January 20, 1877, Lord Chancellor's Office File, 1/42, Great Britain, Public Records Office, Kew Gardens, hereafter cited as LCO 1/42.

[214] Ibid., Holker to Cairns, March 5, 1877.

[215] DNB III, 672; Underhill, Lord Chancellors, p. 182. According to Stephen who had dealings with Cairns over an extended period, the Lord Chancellor was "a regular Commander of the Impenetrable Corps." Stephen to Lytton, July 8, 1878, Stephen Papers, 14/1.

[216] Ilbert, Legislative Methods, pp. 63-70; Underhill, Lord Chancellors, p. 182.

[217] This body was composed of senior law officers of the Crown and among other functions, it advised the Lord Chancellor on consolidation measures. Ilbert lists the names and appointments of the first members of this Committee, which still functions. Ilbert, Legislative Methods, pp. 63-64.

[218] April 10, 1877, LCO 1/42.

[219] Ilbert, Legislative Methods, p. 69; Friedland, "Wright's Code," pp. 307-09.

[220] Stephen to Cairns, May 10, 1877, LCO 1/42.

[221] Ibid., Stephen to Cairns, May 26, 1877.

[222] Ibid., Holker to Cairns, June 1, 1877.

[223] Ibid., Reilly to Cairns, July 20, 1877.

[224] Stephen to Lytton, August 2, 1877, Stephen Papers, 14/1.

[225] Treasury to Cairns, November, 1877; July 12, 1878, LCO 1/42.

[226] Parts I to VI of the Draft Code are substantive provisions; i.e., the penal code; Part VII consists of the code of procedure; Schedule II, the third bill, would have repealed over a hundred Acts or parts thereof.

[227] Parl. Pap., Criminal Code (Indictable Offences) Bill, s. 5, 1878 (178), II, 5-240; hereafter cited as Draft Code 1878.

[228] For Stephen at his most eloquent on this topic, see his evidence before the Select Committee on the Homicide Bill, Parl. Pap., Report, 1874 (315), IX, 45-48.

[229] W.R. Cornish, et al., Crime and Law in Nineteenth Century Britain (Dublin: Irish University Press, 1978), p. 50.

[230] Stephen told Lytton that he had just completed his draft code and continued: "I think Cairns ought to take a favourable view of my fitness for enforcing the criminal law as he has let me codify it . . . ." Stephen to Lytton, October 11, 1877, Stephen Papers, 14/1. The Draft Code 1878 contained seven parts, forty-six chapters and 425 sections.

[231] The arrangement of the Index of the 1878 Draft Code follows exactly that of the Digest, except that after the substantive matter a chapter of procedure has been added to the former. The chapters and sections of the Draft Code and chapters and articles of the Digest follow in approximately the same order, and the content of many sections in the Draft Code is taken verbatim from the Digest. Compare, for example, section 52 of the Draft Code and article 88 of the Digest on unlawful Oaths.

[232] Draft Code 1878, s. 286. For a succinct summary of the many changes, see the list published in The Times, June 27, 1878, p. 10.

[233] Cairns to Statute Law Committee, November 22, 1877, LCO 1/42.

[234] Reilly's remarks are dated December 6, 1877. The Committee submitted its memorandum January 2, 1878, LCO 1/42.

[235] The Nineteenth Century, 2 (1877), 190-216.

[236] Ibid., 2 (1877), 739-59.

[237] Stephen to Lytton, January 2, 1878, Stephen Papers, 14/1. The concept was a logical advance on the civil law system which had retained separate codes, and it was followed by most, if not all common law jurisdictions which have subsequently enacted such legislation. However, the idea may have been Cairns's since a letter from his secretary to the Treasury stipulated that the Criminal Code was to have been "prepared in the form of three Bills: but the three were afterwards under the directions of the Lord Chancellor united in one." July 11, 1878, LCO 1/42.

[238] Stephen to Lytton, May 3, 1878, Stephen Papers, 14/1.

[239] The Contemporary Review, 23 (1873), 5, 18. It is not probable that such criticism would have sounded well coming from a man with no practical experience of the system and one, moreover, who had been soundly beaten in a recent by-election when standing for a safe party seat. Stephen, Life, pp. 344, 348.

[240] Fortnightly Review, 21 (1877), 362.

[241] Compare, for example, Stephen's remarks in "A Penal Code," especially pp. 364, 373, with Holker's address, which introduced the last major item of the day. The House adjourned at 1:15 a.m. Hansard, May 15, 1878, cols. 1936-57, 1959.

[242] Hansard, May 15, 1878, col. 1950.

[243] There were 648 members in the Twenty-First Parliament (1874-80). Of these 123 or 19% were barristers and 218 or 33% were magistrates or other legal personnel for a total of 341 or 52%. These data were derived from Dod's Parliamentary Companion (London, 1879).

[244] Hansard, May 14, 1878, col. 1957.

[245] Ibid., June 17, 1878, cols. 1671-73.

[246] James to Cairns, June 24, 1878, LCO 1/42.

[247] "The Criminal Code," The Times, June 27, 1878, p. 10. The introduction of the Draft Code generated considerable discussion, much of it favourable, in The Times, The Law Times, and other journals, and internationally. See Radzinowicz, Stephen, pp. 63-66 for citations.

[248] Hansard, July 8, 1878, cols. 950-52. Stephen was to receive 1500 guineas for his service on the Commission: Lord Chancellor to Treasury, July 11, 1878, LCO 1/42. It was also at this time that Stephen bargained with Cairns for a judgeship: Stephen to Lytton, July 8, 1878, Stephen Papers, 14/1.

[249] Hansard, August 15, 1878, col. 2039.

[250] TUC Parliamentary Committee to Cairns, July 7, 1878, LCO 1/42.

[251] Hansard, August 15, 1878, col. 2040.

[252] Parl. Pap., Report of the Royal Commission on the Law Relating to Indictable Offences, 1878-79 [c.2345], XX, 1-48; hereafter cited as "Commissioner's Report 1879." Letter, Cairns to Stephen, January 3, 1879, Stephen Papers, 15/28. See also Stephen to Lytton, ibid., February 7, 1879, 14/1.

[253] Commissioners Report 1879, 12-13. The Draft Code contained eight titles, forty-five parts and 552 sections. Thus it was longer than its predecessor of 1878 in terms of sections. See above, Note 230,

for comparison.

[254] Twenty-one members spoke in the debate, sixteen from the Opposition and five Conservatives. Of the total sixteen were barristers. This data was generated from Dod's Parliamentary Companion.

[255] Hansard, April 3, 1879, cols. 310-24. The quotation is at col. 324.

[256] Ibid., cols. 326, 330, et passim.

[257] Ibid., col. 325.

[258] Ibid., cols. 324-26.

[259] Ibid., cols. 323, 346.

[260] "The Criminal Code," The Times, April 18, 1879, p. 3.

[261] It is noticeable in Stephen's correspondence with Lytton that references to the Criminal Code decline very sharply after his elevation to the bench. Moreover, another of the sources of information about the progress of legislation, the Lord Chancellor's Office File, is silent for this period. There is a gap of eight years--1879-1886--in the correspondence.

[262] Hansard, May 5, 1879, col. 1750.

[263] Ibid., col. 1751.

[264] Ibid., cols. 1576-78.

[265] Ibid., col. 1760.

[266] Ibid., col. 1772.

[267] Cockburn's criticism of detail runs to sixteen of eighteen printed folio sheets. His concern with summary offences is expressed on p. 9. Parl. Pap., "Copy of Letter from Lord Chief Justice of England, dated 12 June, 1879 concerning the Criminal Code Bill," 1878-79 [232], LIX, 233-57.

[268] Sir Henry James requested that the letter be tabled in the Commons the day it was dispatched by Cockburn (Hansard, June 16, 1879, col. 1915). On June 26 an edited version appeared in The Times, after the letter had been published as a Parliamentary Paper, and yet another edited version came out in The Law Journal of June 28. The news was soon received and given wide publicity in Canadian and American legal circles also: see the Montreal Legal News, 2 (August, 1879), 280; Canada Law Journal, 15 (August, 1879), 197; Albany Law Journal, 20 (August, 1878), 140.

[269] Holker to Stephen, July 8, 1879, Stephen Papers, 15/95.

[270] Hansard, February 23, 1880, cols. 1239-40.

[271] Ibid., col. 1242.

[272] Ibid., cols. 1242-45.

[273] It is of interest to note that in this, the last attempt ever made to codify English criminal law, the chief protagonists were, as they had been in the past, the Lord Chancellor, his chief law officers, and the lawyers of the Opposition. Altogether there were forty speakers in the debates of 1878, 1879 and 1880, and many spoke several times; twenty-seven, or 70% were barristers and eighteen of these were members of the Opposition. Data derived from Dod's Parliamentary Companion.

[274] For other interpretations see A.H. Manchester, "Simplifying the Sources of the Law," Anglo American Law Review, 2 (1973), 546-50; Friedland," Wright's Criminal Code," pp. 324-25.

CHAPTER VI

Effective British occupation of what is now Canada began in 1749 when Governor Edward Cornwallis led three thousand settlers ashore at Chebucto harbour in Nova Scotia to found the town of Halifax. For five years thereafter he and his successors were not only the military and political heads of the colony but also occupied the chief place in its legal system. Then on the first day of Michaelmas term in 1754, a newly commissioned Chief Justice in full-bottomed wig and scarlet gown led a legal procession from St. Paul's Church to the Court House.[1] Seating himself under the judicial canopy, he "gave some directions for practitioners; the grand jurymen were sworn in and the Chief Justice delivered his charge to them. After this the Court adjourned . . . ."[2] Such was the opening of the first term of the Supreme Court of Nova Scotia: Westminster Hall in miniature it would seem. But appearances are deceptive. In fact, the Nova Scotia system was twice removed from Westminster, and more closely resembled the systems operative in its sister colonies to the south than that of the parent body.

In the first North American colonies, legal institutions and the law developed before English courts had given authoritative direction on the reception of English law in a colony acquired by settlement.[3] Hence, as Lawrence Friedman points out: "That a hundred settlers huddled on an island near what is now the city of Newport, or freezing in the Plymouth winter, should have reproduced this [English court] system exactly, would have been both miraculous and insane."[4] They could not and did not. Neither did they accept the English model for legal education and admission to the bar, nor was the statute law acceptable except on their own terms. Of necessity they developed their legal institutions largely in isolation, much as the English had done before them. But as the English had built on the custom of their Germanic forebears, so the colonists rooted their systems firmly in the common law. Hence, as in the early English experience, their courts were omnicompetent and only slowly separated into legislative and differentiated judicial bodies. In general, early settlers were averse to lawyers. But as society became more complex, bars evolved, staffed by practitioners who were undifferentiated by rank and who received their training as apprentices in their principal's office or, infrequently, at the Inns of Court. However, having no similar institution in the colonies, admission to the bar was controlled by the bench. Written law was largely codified and drew from several sources including English common and statute law, the Bible, and the settlers' own experience. The criminal law, in particular, was much like that of early seventeenth-century England. Moreover, since economic and social conditions were so different in North America, there was little increase in the substantive criminal law during the period when there was such a vast proliferation of penal offences in England.[5] Thus, in comparison with English statute criminal law, that of the colonies was short, concise, and relatively benign in the middle years of the eighteenth century. All of this and more, rather than the custom of Westminster, was the heritage of Nova Scotia.

In large part it was the old colonists who ensured that this heritage was passed on. For, while the first wave of immigrants was largely British-born, many soon abandoned the colony and New England traders, drawn to the region by the opportunity to profit from the massive expenditures involved in making Halifax a rival to Louisbourg became the dominant element. These men were not in favour of the County Court erected by Cornwallis on his arrival and they lobbied effectively for change. It was abolished in 1752 and replaced by Inferior Courts of Common Pleas on the Massachusetts model. New Englanders soon came to dominate the benches of these tribunals, which were vested with the original civil jurisdiction of the common law courts in Westminster and hence regulated private issues at the local level.[6] The remainder of the system instituted by Cornwallis continued as before. Original criminal jurisdiction was exercised by the Court of General Sessions, similar to Quarter Sessions in England.[7] The General Court of Virginia was the model for the Supreme Court. This tribunal was vested with original jurisdiction in all criminal cases and civil causes where the amount in question was over ten pounds and it was the appellate bench for General Sessions and Common Pleas.[8] Appeal from the Supreme Court lay to a Court of Error presided over by the Governor who, like many of his gubernatorial colleagues, also retained his equitable jurisdiction in the Court of Chancery.[9] Finally, as in all other colonies, appeal from the senior tribunals lay not to Westminster, but to the King in Privy Council.[10]

Bench and bar also corresponded to the colonial norm. For when Chief Justice Jonathan Belcher lectured his auditors on that first day of Michaelmas term in 1754, an individual born and educated in Massachusetts, trained for the law in the Middle Temple and whose practice had been in Dublin as a member of the Irish Bar,[11] was addressing a heterogeneous magistracy of soldiers and other professionals and a miniscule and indifferently trained bar of perhaps four or five.[12] The precise origin of the first Nova Scotian bar is unknown. By the terms of his Commission Governor Cornwallis had ample authority to grant licences to individuals to practise law and he may well have done so. On the other hand, it is more probable that, as in neighbouring colonial jurisdictions, the bench of the senior tribunal assumed the authority to examine and admit candidates to the bar, since the justices of the Supreme Court were eventually vested with these powers by statute in 1811.[13] This statute also clarified other matters concerning qualification to practise. For instance, it provided that if a student at law was a university graduate, he had to serve a four-year clerkship under articles before he was eligible to apply for a call to the bar as a barrister and attorney. If a student held no degree, his clerkship was to be for a five-year term after which he could be admitted to practise as an attorney. He was then required to serve a full year as an attorney before he received his call.

On attaining the rank of barrister, he was entitled to plead in all courts in the province, both common law and equity. Provision was also made to admit licensed practitioners from other British dominions. Since these regulations remained virtually unchanged for over fifty years, this would seem to have been a sound and rational scheme. Ideally it was, but circumstances could, and often did, work to corrupt the ideal. Speaking of his own experience in the system a century after its inception, Mr. Justice Russell[14] commented that "it was rather a poor way of getting a student to acquire a profession, and it was a poor and wretched way of testing a student's ability to practice his profession." He described the system in operation:

> The young candidate and aspirant for professional honours and professional distinction articled himself to a practicing barrister. If his barrister happened to be a very busy one the chances were that he would have very little time indeed to give to his student, and if per contra it was a man who was blessed with ample leisure, well then, the chances were that his leisure was due to the fact that he was not fit for anything better than to sit and twiddle his thumbs, so that in either case, whichever way you choose to take it, the dilemma seemed to work out that the student had rather a poor chance. I quite well remember that the examination at the end of the term used to be such as perhaps the student of one year in Dalhousie College Law School at the present day [1918] would think a very trivial ordeal indeed for him to be called upon to pass.
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> . . . [W]hen I was approaching the ordeal myself, I was confidentially taken into his residence by a friend of mine, who [showed me] a washtub full of manuscripts. I asked him what these were, and I was told they were accumulated examination questions which had come down from generation to generation of law students, and by the diligent perusal of that washtub full of examination questions, or even half of them. . . . the candidate would invariably pass, and be very likely indeed to pass with high marks and to obtain first class distinction with honours.[15]

After his call to the bar the new lawyer began to practise his profession and, according to Beamish Murdoch, one of the most prominent Nova Scotian advocates of the nineteenth century,

> . . . as in other parts of North America, business embraces the whole management of his Client's affairs. He is in the first place called on for his opinion as to the propriety of commencing or defending a suit. If an action be resolved on, he is then, as the Attorney of the party, to prepare all the written proceedings by which it is conducted, and as an Advocate to debate the legal questions that may spring out of it before the Judges, and to speak on the merits and facts of the cause to the Jury. In the variety of Courts, from the highest to the lowest, he is called on as business arises to advise his clients, draw up their papers, or declaim in their behalf. We find the Colonial Lawyer at one moment pleading before the Governor and Council, and perhaps the next, defending a trivial assault at the Sessions, or seeking to recover for his client a small debt of 6 or £8 in the Summary Court. One day he is pleading at the Chancery Bar, the next probably at that of the Vice Admiralty, or before the Commissioner of Escheats.
>
> This is not all, for his practice also embraces Conveyancing, and he even acts in the capacity of a Notary Public. All these avocations he must pursue as occasion presents, or he would not be able to retain business.[16]

Although Murdoch did not say so explicitly, it is clear from his account that this state of affairs was primarily the result of the marginal economic conditions which prevailed in the colonies in the early days which were so graphically depicted by the jurist and author, Thomas Chandler Haliburton, in his Sam Slick stories.

Another consequence of this fact was that there was thus little money available for the lawyer to indulge his taste for legal texts and reports. If he did purchase books, the long distance over which they had to be shipped, much of it over water, made the chance of loss or destruction high, as were the shipping charges. Thus, the legal profession collectively did not have many books nor did its members have access to large institutional law libraries. In 1835, for example, eighty years or more after the foundation of the Nova Scotia Bar, the Law Library at Halifax held only 1182 volumes.[17] Of course, the scarcity of books laid an extra burden on the profession as a whole, but particularly on an impecunious student, who would have great difficulty in learning the law without appropriate texts. Furthermore, he would find it difficult to secure or retain business after his call if he was unable to purchase or otherwise gain access to the latest texts and reports, so as to be able to interpret the law for his clients.

In Nova Scotia, a large part of that corpus was the common law which, said Haliburton, had "been considered by the highest jurisdictions in the parent country, and by the legislatures of every colony, to be the prevailing law in all cases not expressly altered by statute, or by an old local usage of the colonists . . . ."[18] The prime manifestation of the common law is the development of case law where courts apply the principles derived from past decisions to the case at bar. This jurisprudence was unusually ample in Nova Scotia because the profession, as exemplified by Beamish Murdoch, took a liberal and comprehensive view of precedent. It was accepted, of course, that the decisions of the courts at Westminster were "received generally as an obligatory interpretation of law in all the dominions of the British Crown. . .[y]et," said Murdoch, "we find much valuable information bearing directly on our legal learning in the large number of American treatises and reports of the Courts of Law in the United States. In like manner the decisions of the Supreme Court in the sister province of New Brunsick are well worthy of our attention."[19] A more concrete example of the adoption of the institutions of the common law is the appearance of the grand jury to receive Mr. Justice Belcher's instructions in November, 1754. No special authority was needed to bring this institution to life in the colony; the summoning of such a body to assist the bench in civil and criminal affairs had been customary for centuries and it was resorted to as a matter of course.[20]

The reception of Acts of Parliament was otherwise. Nova Scotia did not accept all or any English statutes enacted subsequent to 1497, the year of Cabot's discovery and claim of Acadia, unless they had been introduced by charter or commission from the Crown or expressly adopted by the Assembly, or were declared to be law by the courts.[21] This policy was in conformity with colonial practice and is not surprising, considering that the early legislatures were controlled by the New Englanders who had earlier forced the change in the court system and who, by the convention of the first Assembly in 1758, had become the "merchants of Halifax."[22] For the most part Nova Scotian statutes were "home made" by these men, although they often looked to the old colonies for models. They patterned their criminal law on that of Massachusetts.

Hence, in contrast to the hundreds of penal Acts enforceable in England, essentially all indictable offences in Nova Scotia were laid down in two short, concise, almost code-like compilations.[23] Moreover, whereas just one English Statute, the Waltham Black Act, defined fifty or more felonies and enumerated over two hundred capital offences whose focus was the protection of game,[24] the entire substantive criminal law of Nova Scotia specified only sixteen felonies and defined fewer than seventy capital offences.[25]

However, as in England and elsewhere, the winds of change also began to blow in Nova Scotia and progressively during the century which followed the enactment of the penal statutes, there was considerable amendment and amelioration of the criminal law. By 1841, paraphrases of Peel's Acts had begun the process of consolidating and rationalizing criminal procedure, multiple offence felonies were eliminated, with the exception of treason, and capital felonies were reduced to seven.[26] Ten years later, only two capital felonies remained in force: treason and murder.[27] However, the provincial legislators fell into the same trap as had those at Westminster: "felony" became meaningless as a class of crime punishable by death and a felon, convicted of a non-capital offence, could receive punishment less than that of a convicted misdemeanant.[28] Nevertheless, Nova Scotia became the leader of the jurisdictions in British North America which were attempting to rationalize and humanize the criminal law.

Shortly after the features of the legal landscape in Nova Scotia had assumed a settled and familiar form, New France, with its sixty thousand or more _canadien_ inhabitants--the King's "new subjects"--was ceded to Great Britain. The colony had been "conquered," and consequently the rule first enunciated in Calvin's Case in 1608 that ". . . if a king come to a Christian kingdom by conquest . . . he may at his pleasure alter and change the laws of that kingdom . . ."[29] governed the reception of English law and institutions in the new colony of Quebec. The implementation of that rule in 1764 produced what Hilda Neatby has termed "a sort of noisy chaos" for the ensuing decade.[30] In particular, the civilian law and custom of Canada developed prior to the Conquest were replaced by English common law and statute, and the settled French colonial courts were abolished and replaced by a system which bore a superficial resemblance to that of Nova Scotia.[31] Jury trial, mandatory in criminal and optional in private causes was, of course, a feature of the system, as were the grand jury, quarter sessions and a Court of Chancery. Because of the dearth of legal talent available among the few British Protestants in the Province, the senior benches comprised a heterogeneous group largely untutored in the law, who heard arguments from a predominantly canadien bar.[32]

Fortunately for the King's new subjects, the system did not operate as intended by those who framed the Royal Proclamation of 1763.[33] Chaos lasted for a decade or more and then the Quebec Act brought on a more equitable system for the majority, which began to function in 1777.[34] Chancery was abolished; below a Court of Appeal consisting of the Governor-in-Council, there were thereafter two separate, equal and mutually exclusive tribunals. Common Pleas sat weekly, following the French practice rather than the English terms and it adjudicated only in civil suits by inquisitorial process, that is to say, without the intervention of a jury. But jury trial was mandatory in King's Bench which kept terms and heard only pleas of the crown and criminal appeals from quarter sessions.[35] To implement these changes the Governor was instructed to enlarge and reorganize the bench. There were to be six justices of Common Pleas, two of whom were to be _canadien_.[36] While only one of the six, Pierre Panet, had been trained in the discipline of the civil law under the French regime, two of his British brethren, Adam Mabane and John Fraser, had been educated in civil law jurisdictions.[37] More important than these changes, however, was another, requiring that the "Laws [,] Customs & usages of Canada" were to be enforced in Common Pleas.[38] Thus, the old familiar order was to be restored to the _canadiens_, to the chagrin of the British element of the community.[39] On the other hand, the criminal courts were to continue to adjudicate using the English penal law, then at its most cruel and pernicious.[40]

The bar, too, had different aspects in Quebec. The system made no provision for attorneys or solicitors, since the functions of such officers were performed by civilian _notaires_. _Canadien_ lawyers educated to the civil law in the academic, Continental tradition were the first to be licensed to practise, but were soon joined by old subjects trained in the common law.[41] Ideally, each group should have learned to function in the law of the other and in two languages; accordingly, early initiatives were taken to provide this legal lore in an academic setting, but to no avail.[42] Thus, the only requirement for admission to the bar was the grant of a licence from the Governor, the issue of which was an arbitrary power carried over from the French regime, and a source of increasing discontent in the profession as time went on.[43] The issue finally came to a head in 1784 when Alexandre Dumas, a man whom the profession considered to be unqualified in every respect, was licensed to practise law as a barrister by the Lieutenant Governor. With the

Attorney General as their spokesman, the Bar of Quebec protested the admission of Dumas and petitioned the Bench of Common Pleas to make rules for a call to the bar. It was probably this event which led to the Ordinance of 1785, which set out regulations similar to those in effect in Nova Scotia.[44] That is, students at law were required to serve a five-year clerkship with a licensed practitioner and then to pass an examination administered by bar seniors in the presence of the Chief Justice or two puisne judges. Licensed practitioners from England and other British jurisdictions were also required to take the examination, but were not required to serve the clerkship.[45] In 1849, the profession was given full authority to regulate its own affairs. Thereafter, the Bar Society of Lower Canada admitted students to practise law in all courts of the Province, after successful completion of an examination set by the Society. As in the previous period, however, five-year articles were required prior to admission to the examination, but the period was shortened to three years if the candidate had previously completed a programme in Classical Studies, which included a course in law.[46]

The inclusion of the latter qualification in the 1849 legislation only became possible because of the persistence of individuals who wanted to see the academic study of the civil law become a feature of legal education in Lower Canada. There were at least three attempts before 1800 to incorporate an institution of higher learning which would include in its curriculum courses in the civil law and provide students with access to the few hundred ~~legal~~ texts available in institutional holdings.[47] These attempts came to nothing. Thereafter, the bar made increasing efforts to provide instruction in civil law in professional institutions. Then interest in academic instruction picked up again in the 1840s, and within a decade of the appointment of Mr. Justice Badgley as lecturer in law at McGill in 1847, there were faculties of law in operation there and at Laval which educated for the degree of Bachelor of Civil Law.[48]

Meanwhile, there had been a fundamental change in the courts. Common Pleas in which jury trials had been made optional in 1785 for a limited class of commercial cases, was abolished in 1793. Its jurisdiction was assumed by a newly constituted King's Bench which had permanent divisions in Quebec City and Montreal and which rode circuits to bring justice to other locations in the jurisdiction.[49] Inferior terms of these courts decided in a summary manner the small change of civil pleas, but this practice ceased with the establishment in 1821 of inferior tribunals which eventually evolved into district courts.[50] There was, however, no change in the laws these several courts administered. The laws, usages and customs of Canada continued to prevail in all private causes; criminal pleas were tried by English law.

Yet another feature which set Quebec apart from most other North American jurisdictions was its system of government. Nova Scotia, for example, followed the usual colonial practice, having a representative government with an elected assembly. Quebec, on the contrary, was constituted as a "crown colony," governed by an "appointed council with executive and limited legislative powers."[51] In terms of the penal law, however, this was no handicap, since offences were defined and charges laid in accordance with the more than ample English law of 1763. It was only when it was desired to change the law that it was necessary to have recourse to legislation and it is evident that those in power during this period were not receptive to the amelioration of the substantive criminal law, for no such amendments were enacted during their tenure. In fact, the first such amendment was not made in the new jurisdiction of Lower Canada until 1801, ten years after the granting of representative government, when it was enacted that women found guilty of treason were to be hanged rather than burned to death.[52] Thereafter, there were only weak, sporadic, and random efforts to reduce the vast and tangled thicket of felonies and misdemeanours which then constituted the criminal law of Lower Canada.

During the period of chaos in Quebec, the Colony of St. John was separated from Nova Scotia and granted independent status. The new regime, authorized in 1769, was impressive on paper but lacking in substance, since there were fewer than eighty old subjects on the Island at the time. Nevertheless, a Governor was commissioned and instructed to set up courts, commission a council and convene an assembly.[53] Under the Halifax administration a Court of Common Pleas had been established in Charlottetown in which the law of Nova Scotia was enforced. It was abolished and replaced in 1770 by a Supreme Court and a Court of Chancery, which were subordinate to a Court of Appeal consisting of the Governor and his Council.[54] However, the Nova Scotian influence remained strong, for John Duport, the first Chief Justice of the Supreme Court and its single member, was promoted from the bench of Common Pleas in Halifax where he had sat for eighteen years.[55] On Duport's death in 1774, his successor was Peter Stewart, a Scots law clerk whose books and other personal effects were lost when his transport foundered off the coast of the Island.[56] Thus, it is probable that for Stewart's first years at least, the Supreme Court was administered in much the same fashion as it had been under Duport, but with some bias to the civilian law procedure in which the Chief Justice had been trained. Since no other salaried judge joined him on the bench during his twenty-five year tenure, and no inferior courts were created for over a century, it is evident that Stewart and, to a lesser extent, Duport, exercised a major influence on the character and administration of the courts of Prince Edward Island.

If the Island bench was small, the bar was equally so. As late as 1809 there were only five persons trained in the law in the legal establishment, not including Chief Justice Colclough.[57] The reason was clear and well put by Governor Des Barres a year later: "the profits of the profession of the law will not maintain a gentleman."[58] Conditions must have improved after the War, for in 1817 a Statute was enacted to regulate the admission of students of law to practise as barristers and solicitors in the courts of the Colony. Candidates were required to have served a four year clerkship in the office of a licenced practitioner and to pass an examination conducted by the Attorney General or the Solicitor General and the senior barrister, in the presence of the Bench of the Supreme Court. Licensed practitioners from other common law jurisdictions were to be admitted without examination on production of proof of the previous call.[59] Unlike Quebec and Nova Scotia, it was to be seventy years before a concession was made for candidates with a degree or other evidence of higher learning. This concession was instituted in 1842,[60] but as the term of clerkship remained at four years for students at law with a degree and was increased to five years for non-graduates no material benefits accrued to the former. Moreover, every candidate, graduate or not, was enrolled as an attorney only and had to practise as such for one year before he received his call as a barrister.[61] Further regulations made in 1852 provided that barristers from other British colonies were required to be examined by a committee of bench and bar prior to being admitted to practice at the Island Bar.[62]

There is some doubt about what law was administered by the bench and bar of Prince Edward Island in the early years. Chief Justice Duport's Commission of 1770 enjoined him to administer justice in all causes "according to the Laws, Statutes and Customs of our Kingdom of England . . . ."[63] Since he had been a judge in Nova Scotia for almost two decades, it is probable that he had all the relevant statutes and reports to perform his functions efficiently in that jurisdiction. On the other hand, it is unlikely that he would have had all the documents essential to adjudicate in Westminster Hall. Therefore, it is probable that he interpreted his instructions to mean that he was to use the laws and customs of Nova Scotia, as amended or otherwise altered by later Island ordinances and statutes. When the first Assembly was eventually convened some three years later, it did indeed enact that trials in all causes were to be "inquired of, heard and determined, and execution awarded thereon according to the laws . . . of England."[64] But the statute book makes no mention of substantive criminal law then or for another twenty years.

Given the primitive conditions obtaining on the Island and the loss of Chief Justice Stewart's books, it is probable that he, too, looked to Nova Scotia for his law. This hypothesis is rendered more probable by the fact that in 1792 a statute was enacted which, for its first twenty-two sections, was an almost verbatim copy of the 1758 Nova Scotia

Statute of Treasons and Felonies.[65] Since the remaining sections of the Prince Edward Island Act deal with misdemeanours and their punishment, it is reasonable to assume that whatever law had been in force prior to 1792 was either confirmed or abrogated by this enactment, and that it subsumed all the former law pertaining to indictable offences. Thus, in 1792, the penal statutes of Prince Edward Island became virtually identical to the relatively benign rules in force in Nova Scotia.

But the Island legislators moved more quickly, though not so far as those in their sister province, to rationalize the law and to mitigate capital punishment. In emulation of Peel's Acts a decade earlier, two statutes of 1836 paraphrased his legislation and separated the criminal law into procedural and substantive measures. The former provided for the examination, commitment and bailment of accused persons, the taking of depositions, trial procedure, the process to follow to enter a plea of "not guilty" for an accused person who stood mute, the abolition of benefit of clergy, and the class of felony which should be capital.[66] It should be noted that, as in other jurisdictions, the last provision compounded the erosion of the essential distinction between felonies and misdemeanours. On the credit side, however, in the Act concerning substantive law,[67] the number of felonies, including treason, was reduced from sixteen to twelve, and capital offences from over sixty to about thirty.[68] Apart from the abolition of attempted murder as a felony in 1869, this was the condition of the criminal law when Prince Edward Island entered Confederation in 1874.[69]

As a consequence of the British defeat in the American Revolution, the population of Nova Scotia more than doubled between 1781 and 1783. In the main the immigrants were troops of the loyalist regiments raised in the old colonies. For military reasons they were settled in virgin territory along the banks of the St. John river on the mainland, remote from government and population centres. Many of their leaders were resentful because of the losses they had incurred through their loyalty, and found the prospect of having to play second fiddle to place holders in Halifax repugnant and unacceptable. Since they were fortunately situated to do so, they therefore agitated for the creation of a new province which would provide offices and dignities and thus assure them their rightful place in society. Supported by the Commander-in-Chief, Sir Guy Carleton, their petitions were successful and the Colony of New Brunswick, whose institutions and society mirrored those from whence they came, was the result.[70]

In accordance with his instructions the first Governor, Thomas Carleton, erected a court system similar to that of Nova Scotia, with a Supreme Court, Inferior Courts of Common Pleas and courts of General Sessions.[71] The hierarchy of appeal was also similar, as was the constitution of the Court of Chancery and the institution of the grand jury.[72] Staffing the judicial institutions with highly qualified personnel was, for once, no problem; there was a wealth of talent available among the Loyalists. Excepting the Governor who sat in Chancery, the judges and officers of the superior tribunals had all been practising lawyers in the old colonies and the Chief Justice, Gabriel Ludlow, had been a puisne judge of the Supreme Court of New York.[73]

Similarly, the first bar was comprised of practitioners who had learned their law in attorneys' offices from Massachusetts to Virginia. Nine such individuals were admitted to practise in the Supreme Court as barristers and attorneys during its first sitting on February 1, 1785.[74]

For eighty years thereafter, the bench retained absolute control over the selection, education and licensing of students at law. While no authoritative regulations for the organization of the bar have been discovered for the early years, other documents shed some light on the system which, in general, seems to have been similar to that in Nova Scotia. A four-year clerkship served in the chambers of a practising lawyer was evidently the prerequisite to being sworn as an attorney. At any rate this is the period that Gabriel V. Ludlow, the son of the Chief Justice, spent in the office of Ward Chipman, as the latter attested in a certificate issued to Ludlow prior to his application to practise in the Supreme Court.[75] After this, he was required to serve a further period of apprenticeship as an attorney to become eligible for his call as a barrister. The interval was probably two years since this is the period specified by the bench in its first recorded order on the subject in 1823.[76] It was also laid down that college graduates only were eligible to serve the four-year clerkship; non-graduates were required to serve a five-year term.

As in other jurisdictions, legal texts were in short supply and eleven years later the library of the Law Society held only 348 volumes.[77] In 1843, in an era of rising concern over the state of legal education, the judges followed the lead of their brethren in Westminster and ordered that the aspiring attorney must successfully complete an examination set and evaluated by a committee of bench and bar prior to being sworn; they followed this with a rule that required prospective students at law to pass an entrance examination similarly administered.[78] Thus, in addition to at least seven years of post-secondary education and training before the student at law was licensed to practise as a barrister, he was now required to vault two additional hurdles. In a period of rapidly expanding population and economic growth and with an increasing demand for legal talent, this situation must have become a matter of public concern outside the profession since, in 1863, the Assembly made its first legislative intervention in this area and reduced the periods of clerkship to three years for a degree holder and four for a non-graduate.

There has been a good deal of academic controversy concerning the reception date of English statute law in New Brunswick.[79] On the whole, D.G. Bell makes the best case for the date of the Restoration in 1660.[80] However, with respect to the criminal law at least, it is unlikely that the last word has been said. In contrast to their colleagues in Nova Scotia, the New Brunswick legislators did not consolidate and publish the penal legislation during the first sessions of the Assembly. In fact, over the course of four decades they infrequently turned their attention to the substantive criminal law, leaving its development largely to the courts.[81] Hence, since no authoritative reports were made until 1825, there can be no certainty as to which criminal statutes were enforced in those tribunals during the early years. However this problem may be resolved, whichever substantive and procedural statutes were in force, they were repealed in 1829 and 1831, together with all the Imperial enactments on the subject, in legislation which was a close copy of Peel's Acts.[82] Thus New Brunswick became the first jurisdiction in British North America to follow the English lead by consolidating the criminal law and mitigating its severity; for the New Brunswick Acts retained only ten capital felonies and eliminated multiple offence felonies, excepting treason and arson.[83] Further legislation in 1845 made some substantive changes but did not reduce the number of felonies, and these remained in force until Confederation.[84]

The stream of Loyalists which peopled New Brunswick also flowed into Quebec. There the problem of resettlement was more complicated than it had been in the maritime provinces because French was the common language of the colony and the private law and constitutional institutions were different from those of the old colonies. For reasons similar to those which had led to the erection of New Brunswick in 1784, the solution in Quebec was the same. Loyalist regiments were settled on virgin territory on the lower Great Lakes and the upper St. Lawrence remote from the populated areas. To confirm this separation constitutionally and to allow the newcomers to enact law and to develop institutions more in keeping with their needs and traditions, the Province was divided into two jurisdictions, Lower Canada and Upper Canada, with the latter being the haven for the Loyalists.[85]

The Constitutional Act of 1791 which provided for this division did not repeal the Quebec Act, abrogate the law or terminate the legal institutions.[86] Each province was given a legislature and this was the medium through which change was effected in Upper Canada. In 1794 Chief Justice Osgoode, an English barrister, drafted bills to establish courts at the direction of Governor Simcoe, who "was an intense Englishman and was determined to make the institutions of the infant Province as much like those of England as possible."[87] By the terms of subsequent Acts the old local courts of Common Pleas which, it will be recalled, heard actions by inquisitorial proceeding, were abolished and a centralized system was instituted in their stead. A new Court of King's Bench with the civil and criminal jurisdiction of the common law courts at

Westminster was to "be holden in a place certain," to "hear and determine all issues of law" with the intervention of a jury to decide all issues of fact.[88] Out of term, its members were to ride circuit to hear the important civil and criminal actions which had been adjudicated formerly by Common Pleas and Commissioners of Gaol Delivery and Oyer and Terminer, respectively.[89] To assume the jurisdiction of the Courts of Common Pleas in the small change of private actions, District Courts which also proceeded by jury trial were erected, while Courts of Requests staffed by Justices of the Peace heard minor pleas summarily.[90] Since Quarter Sessions instituted under the Quebec Act remained undisturbed and provision was made for probate, the symmetry of this very English model was marred only by the absence of a court of equity.[91] Several reasons have been adduced for this omission, but whatever the cause, it was not repaired until the Court of Chancery was erected in 1837.[92]

Apart from this omission, the legal system developed in accordance with English theory and practice. For over twenty years English barristers filled all the seats in King's Bench, and the first three Attorneys General also received their call at an Inn of Court.[93] Thus, in contrast to Nova Scotia in the early nineteenth century, "English precedent dominated legal reasoning in Upper Canada,"[94] notwithstanding that the majority of the early bar had been educated to the law in Quebec or the old colonies.[95] Even with the appointment of the first Canadian-born Chief Justice, John Beverly Robinson, in 1837, the "legal community [was to] remain English in its customs and procedures" since he "used his position to root out creeping Americanisms."[96]

An early manifestation of this trend was the authority exercised over the profession by the Law Society of Upper Canada. In the first years of the Province when trained legal talent was scarce, the custom of the old Province of Quebec was revived whereby individuals were authorized to practise by commission from the Lieutenant-Governor. Then in 1797, the Society was created by an act "in every line of" which "the hand of an English Barrister is manifest and particularly the provision looking to the separation of the professions of Barrister and Attorney. . . ."[97] In short, a prospective student at law was required to be enrolled on the books of the Society prior to beginning his legal studies and only its governing body--treasurer and benchers as at the Inns of Court--was authorized to issue a call to the bar or to license the aspiring attorney.[98] To qualify for a call as a barrister, the student at law merely had to conform to the rules of the Society--and there were none at that time--and to be on its books for five years, while the intending attorney was required to serve a five-year clerkship and to be on the books for three years.[99] Additional sections protected the rights of current practitioners and provided for the admission of qualified practitioners from other jurisdictions. More importantly, however, the Society was "authorized to form a body of rules and regulations for its own government, under the inspection of the judges of the Province . . . as visitors of the said Society . . . ."[100] Thus, in contrast to other jurisdictions in British North America, the legal profession in Upper Canada became self-regulating at a very early date.

As was common in early colonial times, cash and legal texts were in short supply. The Society first attempted to rectify the situation in 1800, but nothing was accomplished for over a quarter of a century. No purchases were made until 1827, when the Solicitor General, Henry

Boulton, was delegated to go to London "and there bought books amounting to 29 7s 9 1/2d," many of which he retained for some considerable time for his own use.[101] This incident is well described by William Riddell, who also illuminates the hazards of shipping books overseas in those days, and the peripatetic course the texts followed until they were finally lodged in Osgoode Hall sometime in 1831. By 1834, the first catalogue of the Law Society Library listed only 380 volumes. Donations and further purchases brought the total to 850 by 1842.[102]

Within a few weeks of its foundation, the first meeting of the Society was convened and on this and subsequent occasions the rules of the organization were formulated. Rule Number Seven was the first to deal with membership and on this question the split in the Society between the old and the new world became apparent. In essence, the motion was that all intending barristers would have to serve a five-year clerkship, as well as to be enrolled on the Society's books for the same term.[103] It was proposed by Robert Gray, the Solicitor General, in November 1799, and was supported and carried by a large majority of the members who, like Gray, had been trained in North America.[104] The only opposition was from the Attorney General, John White, an English barrister. After being submitted for approval to the judges--all English barristers--it was referred by them back to the Society because of the objection of the Attorney General, who was also a Bencher. After White's death in a duel the following month, the motion was again proposed, carried, and approved by the bench.[105] To sum up: the situation in Upper Canada with respect to the qualifications for becoming a member of the legal profession was now closer to the North American norm than to English practise. Both barrister and attorney were required to serve a five-year clerkship, but while the latter could be licensed after three years on the Society's books, the former had to be on the roll for five years before his call. With such rules it is little wonder that almost all students at law went on to become both barrister and attorney in this early period.[106]

In 1820, the Society turned its attention to entrance standards, ruling that no one should be admitted to its books unless he had demonstrated his ability in English and Latin composition; the scope of this examination was enlarged in 1825 to include history and mathematics.[107] In a further attempt to approximate the English experience, students from 1828 onwards were required to keep four terms at King's Bench at York during their clerkship, in order to learn the practical side of court work.[108] Moreover, presumably to ensure that these measures were effective, a rule of 1831 stipulated that intending barristers must pass an examination in open Convocation prior to their call.[109] With the aim of further improving the general education of lawyers, the term of service for a student at law with a university degree was reduced from five to three years. Although these regulations are different in detail and wider in scope than those in other jurisdictions, the reminiscences of graduates of the system indicate that legal education in Upper Canada was, in fact, no more rigorous or daunting than in Nova Scotia, as described by Mr. Justice Russell.[110]

Later attempts to separate the profession were no more successful than the first had been. Up to 1822, the licensing of attorneys was the prerogative of the Benchers, and aspiring candidates were required to conform to the Society's educational and other requirements. But in that year, they were cut loose. In an Act to incorporate the Law

Society sponsored by the Benchers, a section was inserted which terminated their association with the Society.[111] As such, they "paid no fee, passed no examination and [were] not subject to [the] discipline of the Law Society,"[112] and they could apply to the bench for a licence to practise at the termination of their five-year clerkship. Standards declined, the number of attorneys who did not also become barristers rose, and separation looked imminent.[113] Eager to take advantage of the situation which had been created by the Act, advocates of separation made several more determined efforts to prohibit an individual from becoming a member of both professions. For the same reasons as those advanced by Beamish Murdoch, the majority of the membership was opposed to these initiatives, and the last Bill to divide the professions was defeated in the legislature in 1840.[114] But the standards of the attorney continued to decline, attracting much public and professional criticism.[115] Finally in 1857, the Legislature forced the Law Society to "examine and enquire by such ways and means as they shall think proper, touching the fitness and capacity of [an aspiring student at law] to act as an attorney or solicitor," and thus to reassume jurisdiction over the profession.[116] Admission standards and examinations were reintroduced, the level of proficiency rose and it again became the norm for an attorney to proceed to the degree of barrister.

A prime reason for the division of Quebec was that many Loyalists were dissatisfied with canadien law and custom. So important was this matter that, in 1792, the first two Acts of the first Parliament of Upper Canada addressed and rectified the situation by specifying that "in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England," and that in all such causes issues of fact were to be decided by a jury.[117] The criminal law was, of course, that of 1763 England, which had been continued in force by the Quebec Act. This appears to have been satisfactory for the time being since the Legislature was silent concerning the substantive penal law until 1800. In that year, it was enacted that the criminal law of England as it stood in 1792 was to be the law of the Province. Apart from the fact that this Act abolished the punishment of branding absolutely and thus improved on the imprecise wording of an English Statute of 1779,[118] there is no evidence of any attempt to reduce the number of punishments or to mitigate their severity.[119] It was rather an administrative measure which would incorporate the "divers amendments and improvements [which] have since been made in the same by the mother country."[120] It is possible to discern unannounced but more specific motivations, too. For instance, English case law up to 1792 could be used directly without distinguishing statutes and decisions which were not part of the corpus of Upper Canadian law. The newer and more accurate collections of English statutes would make the current law readily available and, perhaps more important from the point of view of judges and practitioners, the latest English commentaries and books of practice could be used to provide authoritative and up-to-date guidance.

That reform of the substantive criminal law was not contemplated during the Napoleonic Wars in a British jurisdiction which shared a long, open border with the United States is not remarkable. In the years which followed the conflict, however, the harshness of the penal statutes became a matter of increasing concern. Hence, concurrent with the first stirrings of reform in the Twenties, a movement began to ameliorate their severity. After some initial failures, it culminated in the third decade of the century[121] when several statutes were enacted which, while much pruned and attenuated, were modelled on Peel's Acts, and followed the Imperial wording verbatim in many substantive sections.[122] It follows, of course, that much confusing procedural detail was thus left embedded in these provisions. On the other hand, such relics as corruption of the ~~blood~~ on conviction of felony and benefit of clergy were abolished. The centrepiece of the legislation was an Act of 1833 which enumerated the crimes for which "offenders shall be liable to be punished with death."[123] There were eleven such felonies and only two, treason and burglary, defined more than one offence. During the succeeding seven years of the separate existence of the Province, there were few changes in the criminal law and the situation respecting capital felonies remained unchanged.

Thus, when Upper and Lower Canada united as the Province of Canada in 1841, the former had a small body of relatively benign local law which specified few capital felonies. By contrast Lower Canada still retained, almost unchanged, the vast number of cruel English statutes of 1763. The Act of Union did not alter this. On the contrary, it provided that all the laws of the two jurisdictions were to remain in effect "in those parts of the Province of Canada which now constitute the said Provinces respectively."[124] Nor did it make any alteration in the two criminal court systems, and thus in the administration of the law. The implications of these provisions were clear and not too pleasant for an inhabitant of the Province to contemplate: two standards of justice and two systems of punishment would co-exist in one jurisdiction, and he would be subjected arbitrarily to one or the other, depending on his physical location.

Clearly this was an intolerable situation and the administration of Lord Sydenham moved quickly to rectify it. In the first session of the Legislature of Canada in 1841, Henry Black, M.L.A. for Quebec City and Judge of the Vice-Admiralty Court, introduced bills in the House of Assembly to consolidate the criminal law of both provinces and to repeal all previous legislation on the subject.[125] One bill concerned procedure and effectively consolidated both legislation paraphrased from Imperial Acts and local procedural law of which there was by now a substantial amount.[126] The other three measures concerned the substantive law. Mr. Justice Black was a distinguished lawyer and jurist and it might have been thought that his bills would effect some amelioration of the law. For Lower Canada they did; for Upper Canada they did not. In fact, they were virtually identical to the analogous titles of Peel's Acts.[127] It was true that some of the offences in those Statutes which were punishable by death, were mitigated to lesser punishments in the Canadian legislation, but in framing his measures Black had only followed later English amending statutes.[128] The fact remained that the number of capital felonies--eleven--was the same as had been enforced in Upper Canada since 1833.[129] But the primary object had been achieved: most of the substantive and procedural law relating to penal offences was now uniform across the Province. Further amendments to the latter were enacted in 1851 and 1859, but there was no material change in the substantive law or reduction in the number of capital offences prior to Confederation.[130]

In passing it will be noticed that the enactment of the criminal statutes assisted in consolidating the quasi-federal system of government which was implicit in the constitutional provisions of the Union Act. It was most unlikely that Lower Canada would ever agree to the abrogation of the civilian canadien law or that Upper Canada would consider giving up English common law; nevertheless, there would have to be bodies of law common to both sections of the Province, such as the criminal Acts, so that the emergence of three distinct jurisdictions was a foregone conclusion. And so it proved. By the time of the statute consolidations for Canada and Upper Canada in 1859, and Lower Canada in 1860, clear lines of demarcation had emerged between the "federal" and the "provincial" jurisdictions and the bulk of each of the three statute books was about equal.

To sum up: the legal system of British North America on the eve of Confederation was unlike that of England. To begin with, the Parliaments of the colonies had been called into being by written constitutions over which they had no direct legislative control and they were not supreme within their own jurisdictions, as was the Imperial Parliament. Being an area of vast distances and separate and distinct jurisdictions, British North America could have no prestigious and authoritative central tribunals, as at Westminster. Moreover, in respect of the courts in existence, only those in Upper Canada had been erected on the English model, and even there the resemblance was far from exact. A different philosophy guided legal education; there were no centralized institutions of learning such as the Inns of Court, no large institutional libraries, instead, a general dearth of legal texts. The profession itself was organized on different principles. Thus, its judges, who had been obliged to learn to be both attorney and barrister and usually to practise as such, came to the bench and saw the law from a perspective different from that of their English brethren. Finally, the body of law they administered, although firmly rooted in English statutes and customs (excepting the civil law of Lower Canada), developed and branched away from its progenitor because of the social, economic and moral differences between the two societies.

If the sum of British North American experience was unlike the English, so, too, was that of each colony different from the others. If the incipient tribunals of British Columbia and the District of Assiniboia are included, there were seven separate and distinct systems of courts operating on the eve of Confederation. They ranged from Nova Scotia's, which had been functioning for well over a century, to the separate institutions of Vancouver Island and the mainland, which were not united in the Supreme Court of British Columbia until 1870.[131] In terms of their antecedents, the gulf was equally wide. Old French patterns dominated in Lower Canada, Nova Scotia drew heavily on the experience of colonies to the South, and Upper Canada followed the English model. The Benchers of the Law society in Toronto also looked to Westminster and the Inns of Court for inspiration when drafting the rules for legal education. It was otherwise on the lower St. Lawrence, where the profession inclined to Continental practice, which saw academic instruction as the best method of imparting knowledge of the civil law.

Authority in the maritime provinces opted for variations of the American system of legal apprenticeship, whereby students at law learned both theory and practice in a principal's office. To the west, Assiniboia had no organized bar; in British Columbia no provision had yet been made for legal education and the bar was composed of individuals who had received their training in other common law jurisdictions.[132] Similar diversity was also evident in the bodies vested with authority to make regulations for the qualification of lawyers in each jurisdiction and within the regulations themselves. The Bench of the Supreme Court of New Brunswick made all such rules for that province, while in Upper Canada the Benchers of the Law Society promulgated the regulations. In Lower Canada, it could take as few as three years to qualify as a barrister, whereas in Prince Edward Island the minimum period was five years, one of which had to be served in the rank of attorney.[133]

So far as the criminal law was concerned there were six different statute books in British North America and although they were rooted in the English experience, each began with the law of a different time.[134] Nova Scotia took its law as of 1497 and modified and adapted later enactments to suit its particular conditions. British Columbia adopted the humane but still massive body of English law of 1858. The starting points of the penal law in Prince Edward Island, New Brunswick and the Canadas were at varying dates in between. While much effort had been expended in the first half of the nineteenth century to mitigate the severity of the statutes and much had been accomplished, there were still considerable variations among the colonies. In terms of capital felonies the gap was wide, with Nova Scotia having an exemplary low of two and Prince Edward Island and Canada, a punitive high of eleven.[135]

In applying these statutes with the consequent generation of precedents, the senior criminal court of each colony was a law unto itself. It was true, of course, that all colonial courts were subordinate to the Judicial Committee of the Privy Council from 1833, and before that to the King in Council, and were thus bound by Council decisions. But virtually no body of case law had been generated by these tribunals. As Sir John Coleridge said in his judgement on an Australian appeal in 1867:

> . . . [I]nterference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its Officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare.[136]

In British North America they were not rare. They were non-existent. No appeal or leave to appeal in a criminal cause was ever carried to London prior to Confederation. And it should not be thought that the colonies were particularly law-abiding or that there were no such cases. Although no reports were published until well into the nineteenth century, and by no means all cases were reported even then, over one hundred and thirty criminal appeals are recorded prior to 1867 in a representative selection of colonial reports.[137] This not inconsiderable body of case law did not constitute a cohesive source of precedents, however, since a decision enunciated in any given case was binding only on courts within the colony in which it was pronounced, having merely persuasive authority in the courts of sister colonies. It is thus evident that the high courts of criminal jurisdiction in British North America were, de facto, unsupervised tribunals of equal and concurrent jurisdiction, each of which developed and administered a unique body of law.[138] Hence, the system as a whole resembled the decentralized civilian jurisdictions of France and Germany rather than the common law parent in England.

As such it was also similar to that which had prevailed in the Canadas before 1841. In part, the legal problems caused by the subsequent Union were solved by making the criminal law common to both sections of the Province and subject to the quasi-federal authority. The obvious equity and utility of this solution, particularly in comparison with the separate criminal jurisdictions operative in the States of the American Republic was obvious. Hence, it provided John A. Macdonald with a powerful precedent to argue that in the new, larger union "the determination of what is crime and what is not and how crime should be punished" would best be left to the federal government.[139] His words were spoken in the open debate on Confederation in the Canadian House of Assembly and can thus be quoted. What he said in the closed conferences in Charlottetown, Quebec and London is not known. But the force and tenor of his argument must have been similar, since the section dealing with this subject in the British North America Act is one of those which remained unchanged in each successive draft constitution[140] and no record has been found of a voice raised in opposition to the provision, either in the Debates or in other published material.[141]

In the event Macdonald was a successful advocate and the Dominion Parliament was given specific jurisdiction over "the Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."[142] As in 1841, however, all legal and judicial officers retained their positions and all laws and courts were continued in being until repealed, altered or abolished by competent Dominion or provincial authority.

It is thus not surprising to discover that over the next twenty-five years there was not much change in the relationship of the provincial legal systems one to another, although there was internal change in each. Certainly the courts of the provinces did increase in number and personnel, and did adopt increasingly sophisticated forms.[143] But they did so in accordance with priorities set by provincial legislators. Hence, they moved separately and at different speeds toward increasing diversity. Nor was the Dominion Government able to give the several systems an effective and integrating focus at the appellate level. It attempted to do so in 1875 by erecting the Supreme Court of Canada, which was to "have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout Canada."[144] But it did not--could not--abrogate the jurisdiction of the Judicial Committee of the Privy Council. Hence, the Supreme Court was subordinate to that tribunal and a petitioner who lost his cause in Ottawa still retained the right to move his appeal to the Privy Council Chamber or to go to London directly from the provincial superior court.[145] Consequently, problems unique to the Canadian experience were settled by jurists foreign to that experience, often with unexpected and surprising results, and the Supreme Court was not able to generate a definitive body of precedent binding on all lower courts.[146]

Another unsuccessful Dominion initiative was the attempt to abolish the grand jury. Following the English model, that institution was, from the outset, "a sort of county council and local executive," as well as being responsible for the accusation and indictment of malefactors.[147] As such and together with the magistracy, it was responsible for public works and associated inspection procedures, and for the disbursement of government grants to finance these measures. Well before the mid-century colonial legislatures began to chip away at the foundations of the grand jury indirectly by creating municipal institutions which would levy taxes and oversee their expenditure on the well-being and security of the local population. Of course, such institutions were not popular with the public at large who had to pay the taxes, or with the grand jurors and magistrates who thus lost their prime source of patronage, and governments faced with the necessity of enacting enabling legislation did so at their peril, unless it could be done without opposition. This was the case when the first such measure to be enacted in British North America, the Municipal Districts Ordinance of 1840, was pushed through the Special Council in Lower Canada.[148] It was otherwise in Nova Scotia in 1882. There, in the election of that year, voter resentment at the passage of the County Incorporation Act of 1879 was a major factor in defeating the Conservative Party, thus bringing down the Government of John Thompson, Premier *pro tem*, who had given strong support to the bill when he had been Attorney General.[149]

Thompson was a man dedicated to progressive reform, who enjoyed "clearing away tangles of legal underbrush."[150] Nevertheless, it must have taken all his political courage to be one of the most prominent advocates of a measure which abolished the main source of patronage for Nova Scotian grand juries, and particularly since he ignored the warning given to him five days after its introduction by Senator William Miller, a prominent Nova Scotian power broker, who advised him that "very great injustice might be done to the most important interests" if the bill were pushed through without prior consultation with those interests.[151] Moreover, as a practising barrister and legal administrator, he had more knowledge of the privileges and prerogatives, faults and prejudices, of the grand jury than most men, particularly on the criminal side. If, for example, he was counsel for the defence in a criminal action, he was prohibited from appearing before a grand jury on behalf of his client and could thus take no direct action to influence their decision to bring in a true bill, or not. Conversely, if retained by the Crown to prosecute, he had the inestimable benefit of presenting evidence to the grand jurors which could not be refuted.[152] During his tenure as Attorney General of Nova Scotia, he was in charge of the whole criminal justice system and thus had to deal with the problems raised by these and other medieval remnants from the point of view of a legal administrator.

In Upper Canada such anomalies were the subject of ongoing debate in professional literature long before Confederation.[153] They were forced into prominence by the passage of the Indictable Offences Act of 1851, which had been modelled on of the English legislation of 1848 and the system of crown attorneys introduced in 1857.[154] It will be recalled that the former rationalized the procedure of arrest and the preliminary investigation of an offence, while the latter--a Canadian innovation--set up machinery whereby a salaried legal officer framed a bill of indictment from the findings of an examining magistrate and prosecuted for the Crown in any resulting trial. But the symmetry of this arrangement was marred by the grand jury, which could refuse to return a true bill.[155] Moreover, the jurors could also make a presentation of their own volition against a person without any preliminaries by magistrate or prosecutor, or in defiance of a magistrate who had refused to commit an individual for trial in the first instance. After 1867, the institution began to be subjected to public criticism.[156]

One of the first to make his thoughts known was James R. Gowan.[157]

His assertions carried considerable weight for he had been the Simcoe County Court Judge since 1843 and was well versed in the history of the common law and the development of its institutions. Moreover, he was well known to have been Sir John A. Macdonald's private legal draftsman since the 1850s and had, in fact, drafted the Municipal Corporations Act of 1849, and the Crown Attorneys Act of 1857.[158] He thus had an intimate knowledge of the legislation which was cutting away at the foundations of the grand jury. In his charge to the local grand jury in 1877, he drew attention to the defects of the system and particularly to the fact that, at their own request, four-fifths of those committed for trial on criminal charges in Ontario came before the court directly from the committing magistrate[159] without the intervention of the grand jury.[160] His message was clear. If this could be done without injustice in 80% of cases, why not in all cases? In subsequent terms he returned to this theme, not with any desire "of [eliciting] an expression of opinion from these bodies, but as the means of directing public attention to the subject, and promoting, if possible, an enlightened discussion."[161]

However, this debate and the eventual outcome were complicated by a constitutional question. The point at issue was: who had jurisdiction over the grand jury? Oliver Mowat, acting in his capacity of Attorney General of Ontario, contended that "the abolition of Grand Juries is not within the authority of the Dominion Government; that the Grand Jury is a part of the constitution of the court and is not a matter of mere procedure."[162] Ottawa dissented and both parties agreed to refer the question to the Supreme Court in 1879. But Mowat procrastinated over setting a date for the hearing and finally withdrew his consent to the reference the following year. After that, and apart from some provocative legislative manoeuvering by Mowat,[163] the constitutional issue was left in limbo.[164]

Gowan retired from the bench in 1883 and two years later was called to the Senate by his old friend, Sir John A. Macdonald. The Prime Minister was eager to retain the use of Gowan's knowledge and experience and urged him to accept the appointment on the grounds that the Senate "is greatly in need of legal ability, and [the Minister of Justice, Senator Sir Archibald] Campbell knows from me of what value you were to me in years gone by."[165] Within a few months of his appointment, Gowan had become an intimate of the newly recruited Minister of Justice, John Thompson, who, in the intervening years, had seen the grand jury from yet another perspective, when he delivered his charge to it as a Justice of the Supreme Court of Nova Scotia. As a Senator Gowan defies the conventional image of a superannuated party hack dozing away his days in the Upper Chamber. He was tireless in his efforts to advance government bills and Thompson asked for his advice on a variety of measures, ranging from a franchise bill to a proposed summary jurisdiction act.[166]

There is no mention of the grand jury in their early correspondence. Nevertheless, and apparently without consulting Thompson, Gowan again turned his attention to the institution in a full dress speech to the Senate in 1889. In the course of his remarks, he pointed out that it was a medieval institution which had outlived its usefulness; he catalogued what he perceived to be the faults of the system and quoted several senior judges who advocated its abolition.[167] It was a well researched and persuasive speech. But Senator Richard Scott, a distinguished Ottawa lawyer and Leader of the Opposition in the Upper

House, was not persuaded. He denied that a majority of the bench was for abolition. More importantly, he made it clear that the grand jury was a popular institution which a very large majority of the public supported and wished to see continued. Scott admitted that the system was not perfect, but said that on balance its faults were outweighed by its advantages, and he predicted that the Government would not move on the question immediately, and possibly not ever. He concluded by suggesting that the records be searched for a true expression of opinion on the matter from both the bench and the grand jury.[168]

Thompson responded to Gowan's initiative a few days later with a letter in which he congratulated the Senator on his speech "on the question of Grand Juries and County Crown Attorneys which I have read with great pleasure and in the whole of which I concur."[169] But he made no effort to pursue Senator Scott's suggestions or to take up the question as a matter of governmental policy; he did not refer to it when replying to subsequent letters from Gowan which elaborated the issue.[170] In fact, it was not until after Gowan had arrived back from a European vacation the next year and raised the issue directly with the Prime Minister that there is any further mention of the matter.[171] This produced action, however, for a month later Thompson sent out a circular letter to all judges and provincial Attorneys General in which he asked for an expression of their opinion on the "expediency of abolishing the functions of grand juries in criminal cases."[172] But whatever the judges' opinions, it would seem that Thompson was by no means convinced that abolition was either feasible or desirable at that time.[173]

During the uproar of dissolution and the general election of 1891, a steady stream of replies to Thompson's circular letter flowed in, both from judges and grand juries and, presumably, from the Attorneys General. In June, after the new Parliament had settled down, Gowan moved to have the correspondence tabled in the Senate, and gave the members a summary of the replies which had been prepared for him by the Justice Department. According to the Senator, "no less than fifty" of the judges "are in favour of abolition, thirty-nine against, ten doubtful, and two . . . have declined to answer."[174] It was not exactly an overwhelming vote to scrap the system. In fact, Gowan and the Department seem to have been somewhat over-optimistic for when the return was tabled, the results were even closer: forty-eight were in favour of abolition, forty-one against, with twelve doubtful. Moreover, Gowan had not mentioned the opinion of the jurors. Twelve letters from grand juries are printed in the return: ten opposed abolition and only two were for it.[175]

While it may be argued that the grand jury was an outdated institution and that the jurors were partial and biased, there is no doubt that Senator Scott had been correct in his analysis: the public, as represented by the jurors, was opposed to any substantive change in the system. Coupled with the constitutional wrangle which would erupt with the provinces if the Government moved on the question, these facts suggested that any prudent politician would be wise to take Scott's advice and postpone to the distant future any measure to change or abolish the grand jury. In the event, no more was heard of the matter in 1891.

Legal education also continued to reflect provincial priorities. There was, however, a general recognition of the need to require from the intending student at law a higher standard of academic education than hitherto and, in the common law provinces, the desirability of including academic instruction in the law as part of his legal education.[176] In Nova Scotia, the latter process began in a university setting as an extension of a liberal arts education when Dalhousie Law School began its first course of lectures in 1883.[177] After a series of abortive experiments at the University of Toronto and with courses of lectures sponsored by the Law Society, Ontario took a different approach.[178] Osgoode Hall Law School, where the technical study of law dominated, began operation in 1889 as the educational institution of the Law Society of Upper Canada. These were the forerunners and by the turn of the century, most provinces had made some effort to provide systematic education in the law. But the diversity of legal education and bar admission standards in Canada is strikingly illustrated in the text of an address to the American Bar Association in 1899 by Newman W. Hoyles, the Principal of Osgoode Hall Law School. In the course of his remarks he touched on British Columbia, Manitoba, the North-West Territories and Prince Edward Island, in all of which the student depended on lectures given by bench or bar, and on private study to learn his law. Hoyles then detailed the differing courses and curricula offered by the university law schools in Nova Scotia and New Brunswick, as well as the several institutions of Quebec where the basis of instruction was the civil law, and concluded this portion of his remarks by outlining the curriculum of Osgoode Hall.

It is noteworthy, too, that when explaining the rules each province set for admission to its bar, Hoyles was obliged to have recourse to a table of variation, since the regulations were still so diverse that, for example, a general statement concerning the length of service under articles could not have covered all cases.[179] In this respect, it is instructive to recall that although a Dominion Bar Society had been proposed as early as 1876,[180] it was not until 1914, nearly fifty years after Confederation, that a national organization of Canadian lawyers, the Canadian Bar Association, was formed. Even then the only mention of standardization in the Constitution of the Association, its aim "to promote . . . the uniformity of legislation throughout Canada," was carefully qualified by the phrase "so far as consistent with the preservation of the basic system of law in the respective provinces."[181]

While it is apparent that there was still little uniformity among the provincial legal professions in the late nineteenth century, some consistency was becoming evident. It was at this time that "barrister and solicitor" became the professional designation of the Canadian lawyers in the common law provinces. Its use first became current in Ontario, after the passage of the Judicature Act of 1881. This Statute, which was closely modelled on a previous English enactment, united the existing courts of law and equity in the Supreme Court of Ontario. As in England, the difference between the attorney who was an officer of the common law courts and the solicitor, whose practice was in Chancery, had become minimal. Since there would be henceforth a single court, one or the other designation would be redundant. Hence, "true to the principle that, in any contest between law and equity, equity must prevail,"[182] the title "attorney" was abolished and persons entitled to practise as such were thereafter to be referred to as "solicitors."[183] Since almost all such individuals were also barristers, the term "barrister and solicitor" became the lawyers' technical appellation in Ontario and its use eventually became general throughout common law jurisdictions.[184] Incidentally, it is also an explicit reminder that the individual so designated is licensed to practise in both law and equity.

Although vestiges of colonial criminal law remained on provincial statute books for decades after 1867,[185] this was one area where Ottawa was able to move quickly to introduce a large measure of uniformity across Canada. One hundred and ten penal enactments of the former colonies were repealed by the first Parliament.[186] In their place nineteen disparate statutes laid the foundation of the criminal law of the new jurisdiction. Seven of these concerned procedure and were largely or wholly of Canadian origin. For although most of them had been based originally on English statutes, these had been freely adapted over the years to reflect the reality of colonial conditions and to thus diverge from their English models.

It was otherwise with the six which contained the bulk of the substantive law. These were based "on the Imperial Criminal Law Consolidation Acts of 1861 [i.e. Greaves's Acts] and taken almost textually from them."[187] As we have seen, and as Greaves himself was careful to point out, his bills were "chiefly re-enactments of the former law, with amendments and additions. Each bill contains divers enactments taken from different statutes, and generally in the terms used in those statutes."[188] Since most of the substantive law Greaves had to work with had been consolidated by Peel, it follows that his Acts were essentially a restatement of Peel's legislation. As that was the source of the colonial legislation also, the differences between the two were not great. It follows, too, of course, that because the Dominion statutes were such close copies of Greaves's work, they contained all the merits and defects of the originals.

In terms of capital felonies, the new legislation struck a nice balance between the humane practice of Nova Scotia and the relatively punitive law of Prince Edward Island and Canada. Where the former punished only murder and treason with death, and the latter two made eleven felonies capital, the Dominion restricted the death penalty to five. But the current of opinion was running strongly against imposing capital punishment for any crime less than the taking of human life or threatening the existence of government and society. Accordingly, imprisonment was made an optional punishment for rape in 1873, while the penalty for attempted murder and carnal knowledge of a female under ten was reduced to imprisonment in 1877.[189] Thus, within a decade of Confederation, sentiment and legislation had both veered even more strongly in the humanistic direction pointed by Nova Scotia a quarter of a century earlier: treason and murder had become the only crimes which were punishable by a mandatory death sentence under Canadian statute law.[190] That point having been reached, it is evident that the great majority of Canadians, as epitomized by their Members of Parliament in the 1889 debate on executive clemency, now saw the criminal law as being a "most liberal and humane" safeguard for society.[191] Their highly moral, indeed Biblical, view is accurately summarized in Fitzjames Stephen's contemporaneous definition:

> The criminal law may . . . be regarded as a detailed exposition of the different ways in which men may so violate their duty to their neighbours as to incur the indignation of society to an extent measured not inaccurately by the various punishments awarded to their misdeeds.[192]

If there was a large measure of uniformity in the penal law across the Dominion twenty-five years after Confederation, there was still little or none in the institutions which applied it. During that time the Judicial Committee of the Privy Council had heard only one Canadian criminal case--R. v. Coote in 1873.[193] As their Lordships had given the Attorney General of Quebec special leave to appeal because the case appeared to turn on a constitutional issue,[194] it cannot be said that they had departed from their policy respecting criminal appeals as enunciated in R. v. Bertrand and reaffirmed later in their decision to refuse to hear Louis Riel's appeal.[195] In any event, since the Judicial Committee applied their policy evenly to all dominions and colonies, they did not build up a substantial criminal jurisprudence. Nor did the Supreme Court of Canada. Overshadowed from the first by the Judicial Committee and subjected to criticism from the legal profession and the threat of abolition from Parliament, its first years were hesitant and uncertain and its very survival was in doubt.[196] And even though they did their best "to catch an appeal case" the "six melancholy men" in Ottawa infrequently turned their attention to criminal matters.[197] In fact, the Supreme Court heard only thirteen criminal appeals from 1876 to 1892, or an average of less than one case per year.[198] In contrast, four hundred or more such cases are noted in a representative group of provincial law reports during the same period.[199] Taken together with the appeals heard up to 1867, there were thus at least five hundred decisions, a very respectable body of case law, by 1892.

But the situation had not changed with regard to its application during the intervening twenty-five years. As Senator Gowan reminded the Minister of Justice in 1892: just as the Courts of Bordeaux and Lyons could take different views on a question of law, so "the decisions in our Province would not be binding on another, and in this respect it would resemble, I incline to think, the condition in France, whereas a decision in Westminster Hall is law throughout England."[200] He could have said with equal truth that the fragmented legal education system, the provincial legal professions and the insular courts were also unlike the English progenitors and, to a greater or lesser extent, unlike each other. Moreover, in constitutional terms, Canadians were creatures of rational, written constitutions and, since public and private law had been codified at the provincial level and criminal law had been consolidated by the Dominion Government, they did not have to struggle with a random and incomprehensible collection of statutes scattered through the legislative record of a century or more. For all these reasons, the Canadian lawyer and parliamentarian saw the legal system from a quite different perspective than did their English colleagues.

NOTES TO CHAPTER VI

[1] Jonathan Belcher was appointed Chief Justice by the Crown in response to a request from Governor Hobson, after officers of the courts had been accused of libel and partiality. DCB, IV, 50.

[2] Charles Townshend, Historical Account of the Courts of Judicature in Nova Scotia (Toronto: Carswell, 1900), p. 45.

[3] See Blankard v. Goldy (1694), 2 Salkeld 411, 91 E.R. 356 (K.B.); Case 15-Anonymous (1722), 2 P. Wms. 75, 24 E.R. 646 (K.B.); and Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045, for a full discussion of how English possessions were perceived to have received English law. For commentary on these cases, see Thomas G. Barnes's "As Near as May be Agreeable to the Laws of this Kingdom: Legal Birthright and Legal Baggage at Chebucto, 1749," in Law in a Colonial Society, ed. Peter Waite et al. (Toronto: Carswell, 1984). In his analysis Barnes asserts that Nova Scotia was "a colony acquired by conquest confirmed by treaty" (p. 14). In terms of constitutional law, this is a debatable point. Certainly, earlier authoritative commentators did not agree with Barnes: see Thomas C. Haliburton, History of Nova Scotia (1829; rpt. Bellville, Ont.: Mika Press, 1973), I, 8, 39; William Forsyth, Cases and Opinions on Constitutional Law (London: Stevens & Haynes, 1869), p. 26; George W. Burbidge, A Digest of the Criminal Law of Canada (Toronto: Carswell, 1890), p. 12. See also the Treaty of Utrecht wherein there is no mention of the cession of Acadia to Great Britain, but in which Article 14 stipulates that "It is expresly [sic] provided, that in all the said Places and Colonies to be yielded and restored by the most Christian King . . ."(my italics) in Major Peace Treaties of Modern History, ed. Fred L. Israel (New York: Chelsea House, 1967), I, 210. Of course, this is by now of academic interest only. What is of continuing importance is that the people of Nova Scotia perceived themselves to be inhabitants of a colony acquired by peaceful settlement and developed their law accordingly. See, for example, the preamble to 1759, 33 Geo. 2, c. 3 (N.S.) which states: "this Province of Nova Scotia, or Acadie, and the property thereof did always of right belong to the Crown of England, both by priority of discovery and ancient possession."

[4] Lawrence M. Friedman, A History of American Law (New York: Simon & Schuster, 1973), p. 32. The following discussion is based on Friedman's excellent summary, "American Law in the Colonial Period," pp. 29-90; see also 275-76.

[5] Beamish Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia," in Law in a Colonial Society, pp. 190, 193.

[6] William S. Macnutt, The Atlantic Provinces (Toronto: McClelland & Stewart, 1965); Townshend, Courts, p. 46. For a more comprehensive account of the court system, see Haliburton, History, I, 162-64.

However, Townshend and Haliburton differ in detail and their accounts are sometimes difficult to reconcile. While Haliburton's account is the more coherent of the two, it is not documented. Townshend, on the other hand, quotes copiously from sources which he cites.

[7] Townshend, *Courts*, p. 46. The author states that: "It has not been made very clear to me exactly to what extent they [Courts of General Sessions] exercised jurisdiction in civil and criminal matters. . . ." If, however, their powers were similar to those of Quarter Sessions in England (Haliburton, *History*, I, 163; II, 336), then they had original criminal jurisdiction to try all indictable offences and very limited authority in a few minor civil causes. However, according to Madame Justice Oxner, "The Lower Courts of Nova Scotia," in *Law in a Colonial Society*, p. 63, "The Sessions Court generally committed the more serious offences to the Supreme Court."

[8] Townshend, *Courts*, pp. 19-22, 46.

[9] Ibid., p. 64; Friedman, *American Law*, p. 47.

[10] Townshend, *Courts*, pp. 24, 30.

[11] DCB, IV, 50.

[12] Fifteen individuals have been identified as being on the bench or at the bar in 1754. Apart from the Chief Justice only two had legal training: Otis Little of the Massachusetts Bar (DCB, III, 404) and John Duport, an English attorney (Townshend, *Courts*, p. 32). Two others may have been trained in law: George Suckling, an Englishman (DCB, IV, 724) and James Monk, senior, of Massachusetts, the father of the future Chief Justice of Lower Canada. The eleven others were justices of the Common Pleas and comprised five army officers, a merchant, a school teacher, the Governor's clerk, and three whose occupations are unknown. Five were born in England, two in the colonies, one in Switzerland and the birthplaces of the other three are unknown. However, the balance soon tipped in favour of the colonial born, for of twenty-seven persons identified as having served on the bench or at the bar by 1800, only ten are known to have been born in England.

[13] 1811, 51 Geo. 3, c. 3 (N.S.).

[14] Benjamin Russell (1849-1935); lawyer, jurist and author; educated Mount Allison University, B.A., M.A., D.C.L.; called to the Nova Scotia Bar 1872; M.P. 1896; appointed puisne judge of Nova Scotia Supreme Court 1904; died in office. His *Autobiography of Benjamin Russell* (Halifax: Royal Print & Litho, 1932) is a valuable source of information on mid-nineteenth century university education in general and legal education in particular. See pp. 105-07 for detailed amplification of his quoted remarks.

[15] Benjamin Russell, "Legal Education," in *Proceedings of the Canadian Bar Association*, 3 (1918), 118-19. In Russell's time the system was essentially the same as it had been in 1811 and before.

[16] Beamish Murdoch, Epitome of the Laws of Nova Scotia (Halifax: Joseph Howe, 1832), I, 6. Murdoch (1800?-1876), "Nova Scotia's Blackstone"; lawyer, author, judge, politician; called to the bar 1822; M.L.A. 1826-30; Recorder of Halifax 1860-70; editor, Acadian Recorder. Although his History of Nova Scotia is said to be his major work, the first volume of his Epitome is a good read for a layman. Its language is non-technical and the style is clear and lucid. Like his notional namesake (Blackstone, Commentaries, I, 30-34) Beamish was a staunch advocate of education in the liberal arts as a necessary preliminary to a legal career. His remarks on this subject are cogent and as true today as they were in 1832; Epitome, I, 8-10.

[17] Law Library, Halifax, Catalogue of Books in the Law Library at Halifax (Halifax: J.S. Cunnabell, 1835).

[18] Haliburton, History, II, 344. In 1848 this interpretation of contemporary English law on the subject [Case 15-Anonymous (1722), 2 P. Wms. 75, 24 E.R. 646 (K.B.)] was quoted with approval by Brenton Halliburton, Chief Justice of the Province, in his judgement in Uniacke v. Dickson (James, 1848), 2 N.S.R. 287 at 289.

[19] Murdoch, "An Essay," p. 191. Such learning would be rendered necessary by the fact that Murdoch advocated the use of an American textbook as a legal primer for Nova Scotia law students: Epitome, I, 10.

[20] The institution of the grand jury was in place at least as early as 1749 and may even have been empanelled at an earlier date: Townshend, Courts, pp. 5, 6, 10.

[21] Forsyth, Constitutional Law, pp. 18-20; Burbidge, Digest, p. 12, n. 1; Uniacke v. Dickson, 291, passim. The case involved two English statutes enacted in 1541 and 1571 respectively. They were held not to be in force in Nova Scotia by Halliburton, C.J.

[22] Macnutt, Atlantic Provinces, p. 59.

[23] 1758, 32 Geo. 2, c. 13 (N.S.); 1758, 32 Geo. 2, c. 20 (N.S.).

[24] Radzinowicz, HECL, I, 50, 76.

[25] 1758, 32 Geo. 2, cc. 13, 17, 20 (N.S.). Many felonies could be committed by doing or ommitting to do one or more of several specific acts: for example, one could be charged with treason for compassing the king's death by levying war on him or by adhering to his enemies. This was the reason there were many more capital offences than felonies.

[26] 1839, 2 Vic., c. 7 (N.S.); 1841, 4 Vic., cc. 4, 5, 6, 7 (N.S.); cf. Peel's Acts.

[27] R.S.N.S., 1851, cc. 155, 162. No substantive changes were made to this system prior to Confederation. See Appendix 3.

[28] For instance, individuals convicted of the misdemeanour of remaining in a riotous assembly after the proclamation to disperse had

been read were liable to four years imprisonment (R.S.N.S., 1851, c. 160, s. 6), while those convicted of the felony of placing explosives in a public place were punished by a maximum of three years imprisonment (ibid., c. 166, s. 6.).

[29] 7 *Coke's Report* 18a; 91 E.R. 398. For amplification of the rule see *Campbell v. Hall* (1774), 1 Cowp. 204; 98 E.R. 1045. Its later development is outlined by R. MacGregor Dawson, *The Government of Canada*, 5th ed. (Toronto: University of Toronto Press, 1973), p. 5.

[30] Hilda Neatby, *The Administration of Justice Under the Quebec Act* (Minneapolis: University of Minnesota Press, 1937), p. 3.

[31] Governor Murray's instructions directed him to use Nova Scotia as a model: Adam Shortt and Arthur Doughty, *Documents Relating to the Constitutional History of Canada 1759-1791* (Ottawa: King's Printer, 1918), I, 187. For the constitution of the courts, see ibid., I, 205-09. For the confusing result, see Neatby, *Administration*, p. 3.

[32] Chief Justice Gregory, an English barrister, was the only judge who had been educated for the law (MDCB, p. 283); Shortt, *Documents*, I, 206, n.; Hilda Neatby, *Quebec: The Revolutionary Age 1760-1791* (Toronto: Macmillan, 1966), pp. 34-37, 50; Neatby, *Administration*, p. 205; William R. Riddell, *The Bar and Courts of Upper Canada or Ontario* (Toronto: Macmillan, 1928), I, 7, 18. Note that two volumes are bound together in the latter work.

[33] For the text of the Royal Proclamation, see R.S.C. 1970, Appendix, p. 123.

[34] 1774, 14 Geo. 3, c. 83 (Imp.).

[35] Shortt, *Documents*, II, 680, 690.

[36] Ibid., II, 600; Neatby, *Administration*, pp. 22, 351-54.

[37] Léon Lortie, "The Early Teaching of Law in French Canada," *Dalhousie Law Review*, 2 (1975-76), 522. Mabane was born in Scotland and educated at Edinburgh University (MDCB, p. 427); Fraser was also Scots born but was educated in France (MDCB, p. 246).

[38] Shortt, *Documents*, II, 641, 680.

[39] This statement is literally true. But it is an oversimplification of a most complex situation which is discussed in detail in Neatby, *Quebec*, pp. 125-41, 156-71.

[40] Shortt, *Documents*, II, 638, 690.

[41] Riddell, *Bar and Courts*, I, 7, 18.

[42] Lortie, "Teaching of Law," p. 525.

[43] Riddell, *Bar and Courts*, I, 6, 20, 30.

[44] For details of this incident, see ibid., I, 20-23; see also 1785, 25 Geo. 3, c. 4 (L.C.).

[45] 1785, 25 Geo. 3, c. 4 (L.C.).

[46] 1849, 12 Vic., c. 44 (L.C.); details in Lortie, "Teaching Law, p. 521; B.A. Testard de Montigney, Histoire du droit canadien (Montreal, 1869), p. 576.

[47] It is unlikely that there were more than a thousand legal texts available in universities and other institutions at the turn of the century. In 1828 La Bibliothèque du barreau held only 325 volumes and over the next twenty-three years only 1700 titles were added. Antonio Drolet, Les Bibliothèques canadiennes (Ottawa: Le Circle du livre de France, 1965), pp. 55, 94, 111.

[48] For details of these events, and the fascinating account of Maximilien Bibaud's private law school, see Lortie, "Teaching the Law," pp. 525-32.

[49] 1793, 23 Geo. 3, c. 6. For detail see de Montigney, Histoire du droit, pp. 442-43.

[50] 1841, 4&5 Vic. c. 20 (Cda.). For detail of the many changes which took place in this period, see de Montigny, Histoire du droit, pp. 443-50.

[51] 1774, 14 Geo. 3, c. 83, s. 12 (Imp.); Neatby, Quebec, p. 33.

[52] 1801, 41 Geo. 3, c. 9, s. 1 (L.C.).

[53] Frank Mackinnon, The Government of Prince Edward Island (Toronto: University of Toronto Press, 1951), p. 11.

[54] Ibid., pp. 15, 27.

[55] Alexander Warburton, A History of Prince Edward Island (St. John, N.B.: Barnes & Co., 1923), p. 415.

[56] DCB, V, 776.

[57] Donald A. Mackinnon and Alexander B. Warburton, Past and Present of Prince Edward Island (Charlottetown: Bowen & Co., n.d.), p. 135.

[58] Mackinnon, Government of P.E.I., p. 57. As in other British North American colonies, bench and bar were a heterogeneous group. Of six early legal personages of P.E.I. for whom biographical material is available, one was from Scotland, two from Ireland, one from England and two from the old colonies.

[59] 1817, 57 Geo. 3, c. 4 (P.E.I.).

[60] 1842, 5 Vic., c. 21 (P.E.I.).

[61] 1848, 11 Vic., c. 31, s. 12 (P.E.I.).

[62] 1852, 15 Vic., c. 22, s. 2 (P.E.I.).

[63] Quoted in Mackinnon, Government of P.E.I., p. 14.

[64] 1773, 13 Geo. 3, c. 8 (P.E.I.).

[65] 1792, 32 Geo. 3, c. 1 (P.E.I.).

[66] 1836, 6 Will. 4, c. 21 (P.E.I.); cf. 1826, 7 Geo. 4, c. 64 (Imp.) and 1827, 7&8 Geo. 4, c. 28 (Imp.).

[67] 1836, 6 Will. 4, c. 22 (P.E.I.); cf. Peel's Acts.

[68] See Appendix 2.

[69] 1860, 32 Vic., c. 19, s. 1 (P.E.I.). See also Appendix 3.

[70] MacNutt, Atlantic Provinces, pp. 95-7.

[71] Joseph W. Lawrence, Judges of New Brunswick and Their Times (St. John, n.p., 1907), p. 16.

[72] Ibid., 17-18, 26. See also Acts of the General Assembly of Her Majesty's Province of New Brunswick (Fredericton: Queen's Printer, 1838), Appendix 1, Courts.

[73] Lawrence, Judges of New Brunswick, pp. 21, 39, 59; MDCB, 764.

[74] Ibid., pp. 21, 22. Of the fifteen names listed on these pages thirteen were born, educated and practised in the old colonies; one, Elias Hardy, was born and educated in England, although he subsequently practised in New York for ten years or more. While no biographical data has been found for the remaining individual, Samual Denny Street, it would appear from casual references to him that he too was an old colonist. DCB, V, 161, 353.

[75] Reproduced in Lawrence, Judges of New Brunswick, p. 180.

[76] G.A. McAllister, "Some Phases of Legal Education in New Brunswick," University of New Brunswick Law Journal, 8 (1955), 43, n. 74. In an Order of 1835 the bench reduced the interval to one year for an attorney who held a degree.

[77] A Catalogue of Books Belonging to the Law Society of New Brunswick (Fredericton: John Simpson, 1834).

[78] McAllister, "Legal Education," pp. 39, 43.

[79] All English law enacted before this arbitrarily selected date is considered to be in force in the colony. Legislation enacted in Westminster after the reception date does not bind the colony unless it is specifically named in the enactment.

[80] D.G. Bell, "A Note on the Reception of English Statutes in New Brunswick," University of New Brunswick Law Journal, 28 (1979), 195. See pp. 196-97 for Bell's discussion of reception dates other than 1660.

[81] Between 1786 and 1829 only one capital felony was enacted. Individuals convicted of procuring a miscarriage "shall suffer death"; 1810, 50 Geo. 3, c. 2 (N.B.). Considering the law in effect in England and other colonial jurisdictions at this time, punishments were relatively benign. For example, killing moose drew a fifteen-pound fine (ibid., c. 22), while the penalty for killing red and fallow deer was a five-pound fine.

[82] 1829, 9&10 Geo. 4, c. 2 (N.B.); 1831, 1 Will 4, cc. 14, 15, 16, 17 (N.B.). The first two statutes of this series listed all the Acts which had been repealed by the Imperial legislation and recited that "the Statutes or Acts of Parliament . . . so repealed in England . . . or such of them as are in force in this Province, be and the same are hereby declared to be repealed."

[83] See Appendix 2.

[84] See Appendix 3.

[85] For details, see Gerald M. Craig, Upper Canada: The Formative Years 1784-1841 (Toronto: McClelland and Stewart, 1963), pp. 1-19.

[86] 1791, 31 Geo. 3, c. 31 (Imp.).

[87] Riddell, Bar and Courts, II, 86.

[88] 1794, 34 Geo. 4, c. 3, s. 1 (U.C.).

[89] Ibid., s. 17.

[90] 1794, 34 Geo. 3, c. 3 (U.C.); 1792, 32 Geo. 3, c. 6 (U.C.); Riddell, Bar and Courts, II, pp. 78-80, 93-94.

[91] 1793, 33 Geo. 3, c. 8 (U.C.).

[92] For details and analysis, see Riddell, Bar and Courts, II, 161-82.

[93] David B. Read, The Lives of the Judges of Upper Canada and Ontario (Toronto: Roswell & Hutchinson, 1888), pp. 17, 43, 53; Riddell, Bar and Courts, I, pp. 35, 64.

[94] Patrick Brode, Sir John Beverly Robinson: Bone and Sinew of the Compact (Toronto: Osgoode Society, 1984), p. 104.

[95] Of twenty-seven men who have been identified as members of the bar in Robinson's time and for whom biographical information has been found, only four are known to have been born and educated for the law in England. Of the remaining twenty-three, six received their legal education in Upper Canada, five in old Quebec and four in the old

colonies. No biographical date has been found for the remaining eight.

[96] Brode, Robinson, p. 162.

[97] 1797, 37 Geo. 3, c. 13 (U.C.); Riddell, Bar and Courts, I, p. 47. It will be noted that there is no mention of the "solicitor" in early Upper Canadian records. This is not an ommission. The solicitor was an officer of the Court of Chancery and since there was no such court in Upper Canada until 1837, there was likewise no solicitor until then.

[98] 1797, 37 Geo. 3, c. 13, ss. 5, 6 (U.C.).

[99] The terms were precisely the same in England. The only difference otherwise was that the intending English attorney was not a member of an Inn and his education and admission to practice were controlled by the courts. See Holdsworth, HEL, VI, pp. 431-75 for the historical development of the profession, and XII, pp. 22, 54 for the situation at the end of the eighteenth century.

[100] 1797, 37 Geo. 3, c. 13, s. 2 (U.C.).

[101] Individual donations or bequests rarely exceeded half a dozen volumes. If research indicated that a given set of volumes would involve a substantial outlay, the purchase was not made. Moreover, like Chief Justice Stewart's lawbooks, shipments to the Law Society were lost at sea or elsewhere in transit: William R. Riddell, The Legal Profession in Upper Canada (Toronto: Law Society of Upper Canada, 1916), pp. 83-104.

[102] Ibid., p. 92.

[103] Ibid., p. 11.

[104] Ibid., p. 12, n. 17.

[105] Ibid., p. 13.

[106] Loc. cit.

[107] Ibid., pp. 39, 41.

[108] Ibid., p. 41.

[109] Ibid., p. 42.

[110] See Charles Durrand, Reminiscences of Charles Durrand (Toronto: Hunter Rose, 1897), pp. 60, 76, 121; James C. Hamilton, Osgoode Hall Reminiscences of the Bench and Bar (Toronto: Carswell, 1904), pp. 26-31, 147-60; Edward Gillis, "Legal Education in Ontario," Canadian Law Review, 4 (1905), 101-05; J.E. Farewell, "The Student at Law in the Early Sixties," Canadian Law Times 35 (1915), 53-56; D.G. Kilgour, "A Note on Legal Education in Ontario 125 Years Ago," University of Toronto Law Journal, 13 (1959-60), 270-72.

[111] 1822, 2 Geo. 4, c. 5, s. 3 (U.C.).

[112] Riddell, Legal Profession, p. 18.

[113] Ibid., p. 32.

[114] Ibid., pp. 20-21.

[115] Ibid., p. 20; for statistics of the attorneys' decline, see the table on p. 32.

[116] Ibid., p. 21.

[117] 1792, 32 Geo. 3, cc. 1, 2 (U.C.).

[118] 1779, 19 Geo. 3, c. 74, s. 3 (Imp.). By this Act "branding was practically abolished, though the words of the act are not absolute." Stephen, HCL, I, 463.

[119] It must be remembered that the substantive English criminal law of 1792 was hardly more enlightened than that of 1763. This is amply demonstrated in the records of the times. For example, in his Fall circuit of the Eastern District in 1820, Powell, C.J., sentenced three persons to hang: one for horse theft, one for rape and one for murder. Only the last, an Indian boy of ten, was reprieved. Several more were banished for life for what would now be considered minor offences. William R. Riddell, Upper Canadian Sketches (Toronto: Carswell, 1922), pp. 33-37. See also the examples cited by Brode, Robinson, p. 106.

[120] 1800, 40 Geo. 3, c. 1, s. 1 (U.C.).

[121] For discussion, see Brode, Robinson, pp. 107, 184.

[122] 1832, 2 Will. 4, cc. 1, 4 (U.C.); 1833, 3 Will. 4, cc. 2, 4 (U.C.).

[123] 1833, 3 Will. 4, c. 3 (U.C.).

[124] 1840, 3&4 Vic., c. 35, s. 46 (Imp.).

[125] Elizabeth Gibbs (née Nish), ed. Debates of the Legislative Assembly of United Canada (Montreal: Centre d'Etudes du Québec, 1978) August 27, 1841, pp. 710-11, 713. Henry Black was a supporter of the administration and had been a member of Sydenham's Special Council, DCB, X, 68.

[126] 1841, 4&5 Vic., c. 24 (Cda).

[127] Consolidated Statutes of Canada, 1859, Commissioners' Report, p. vi. The statutes were: 1841, 4&5 Vic., cc. 25, 26, 27 (U.C.).

[128] For example, procuring an abortion was a capital felony under 1829, 9 Geo. 4, c. 31, s. 13 (Imp.), whereas by the analogous Canadian Act, 1841, 4&5 Vic., c. 27, s. 14 (Cda), a convicted felon was liable

only to imprisonment.

[129] See Appendices 2 and 3.

[130] 1851, 14&15 Vic., cc. 95, 96 (Cda). These were largely modelled on the English statutes of 1848, 11&12 Vic., cc. 42 and 43 (Imp.). However, many specifically Canadian innovations made in the intervening years were included in the criminal procedure Acts in the C.S.C., 1859, cc. 99-103 inclusive.

[131] R.S.B.C., 1871, c. 135.

[132] 1863; 26&27 Vic., Statute 8 (B.C.).

[133] See Appendix 5.

[134] For the law of Assiniboia and the Northwest Territories, see Desmond Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian North West Before 1886," *Alberta Law Review*, 17 (1979), 497-507.

[135] See Appendix 3.

[136] *R. v. Bertrand* (1867), L.R. 1 P.C. 520 at 530. See also the precedents cited by the Minister of Justice, Sir John Thompson, in his report to the Governor General on criminal appeals to the Judicial Committee. Canada, Parliament, Sessional Papers 1889, No. 77.

[137] Out of a total of 134 criminal appeals prior to 1867:

N.S.Rep.	15
L.C.Rep.	27
P.E.I.Rep.	1
N.B.Rep.	32
U.C.Q.B.Rep.	44
U.C.C.P.Rep.	15

These do not include all the Reports of the time, but they suffice to indicate the trend.

[138] One result of decentralization was that the opportunity for advancement was restricted. A place on the provincial bench or leadership of the bar was the most a lawyer could hope for if he stayed within the system--a big fish in a little pond.* If he aspired to greater fame or fortune in the legal arena, he had to leave the colony for a place within the Imperial system or remove to the United States. Alternatively, for the man who hoped for greater glory but who wished to retain the security of his income from the bar and his ties with colonial society, there was the possibility of combining the law with politics as did, for example, John A. Macdonald. This is no doubt the reason why there were forty-seven lawyers, who comprised 25% of the membership, in the first House of Commons after Confederation. See Henry J. Morgan, *Canadian Legal Directory* (Toronto, 1876), pp. 274-75 for details of Canadians who attained eminence as judges on colonial benches outside North America; and Durrand, *Reminiscences*, p. 396, on

the migration of Canadian lawyers to the United States.

*In 1867 there were approximately 1480 lawyers in British North America disposed as follows:

Nova Scotia	140
Lower Canada	340
Prince Edward Island	30
New Brunswick	310
Upper Canada	650
British Columbia	10

In contrast there were only forty-five seats on the senior benches of the colonies. All figures were derived from the data in Morgan, *Legal Directory*.

[139] *Parliamentary Debates on Confederation* (Quebec: Hunter, Rose & Co., 1865), p. 41.

[140] Canada, Senate, *Report Concerning the Enactment of the British North America Act of 1867 . . .* (Ottawa: King's Printer, 1939), Annex 4, pp. 52, 70, 91.

[141] Christopher Dunkin, Conservative M.L.A. for Brome, mentioned the subject in passing in the course of his speech criticizing the proposed union and two questions were asked concerning the jurisdiction of the federal government in criminal matters after Confederation. Apart from these utterances and John A. Macdonald's speech, the *Confederation Debates* are silent on the subject; pp. 508, 576-77.

[142] 1867. 30&31 Vic., c. 3, s. 91 (Imp.).

[143] See, for example, 1881, 44 Vic., c. 5 (Ont.), which abolished the separate superior courts of the Province and erected in their place the Supreme Court of Judicature for Ontario, and otherwise transformed the whole system. Nova Scotia enacted similar legislation in 1884, 47 Vic., c. 25 (N.S.); Quebec in 1883, R.S.Q., arts. 2289-2776; New Brunswick in 1897, 60 Vic., c. 24 (N.B.).

[144] 1875, 38 Vic., c. 11, s. 16 (Cda).

[145] Apart from the fact that it was more convenient and less expensive for an appellant's counsel to go to Ottawa ~~rather~~ than directly to London, the Supreme Court was, in many respects, a judicial "spare wheel," until 1949 when appeals to the Privy Council were abolished. For background on this question, see Michael J. Harmon, "The Founding of the Supreme Court of Canada and the Abolition of the Appeal to the Privy Council," *Ottawa Law Review*, 8:7 (1976), 7-31. For more detail, see James G. Snell and Frederick Vaughn, *The Supreme Court of Canada* (Toronto: Osgoode Society, 1985), pp. 145-71.

[146] See Frank R. Scott, *Essays on the Constitution* (Toronto: University of Toronto Press, 1977), pp. 46-48, for a short discussion on this subject and Peter B. Waite, *Canada 1874-1896* (Toronto: McClelland & Stewart, 1971), pp. 116-19, for a discussion of specific cases.

[147] "Grand Juries," Canada Law Journal, 27 (1891), 6.

[148] 1840, 4 Vic., c. 4 (L.C.). For details, see A.D. DeCelles, "The Municipal System of Quebec," in Canada and Its Provinces, ed. A. Shortt and A.G. Doughty (Toronto: Brook & Co., 1914), XV, 291-95.

[149] Peter B. Waite, The Man from Halifax (Toronto: University of Toronto Press, 1985), p. 114; J. Murray Beck, The Government of Nova Scotia (Toronto: University of Toronto Press, 1957), p. 302; John Castell Hopkins, Life and Work of the Rt. Hon. Sir John Thompson (Toronto: United Publishing, 1895), p. 63.

[150] Waite, Man from Halifax, p. 437.

[151] Miller to Thompson, April 9, 1879, PAC, John Sparrow David Thompson papers, microfilm, reel c 9235; Waite, Man from Halifax, p. 87. For biographical detail on Miller, see Henry J. Morgan, The Canadian Men and Women of the Time (Toronto: William Briggs, 1912), p. 804. For the multifarious duties of the grand jury and the concomitant opportunities for profit under the old system, see R.S.N.S. 3rd series, 1864, c. 45.

[152] The Canadian system parallelled the contemporary English practice. See "Grand Juries," Canada Law Journal, 27 (1891), 4-9 for detail.

[153] Discussion in the Upper Canada Law Journal was remarkably impartial for that time and place: in "Abuse of the Grand Jury System," [5 (1859), 51] the author catalogues the defects of the system and advocates legislation to correct them; "Grand Juries" [2 (1856), 237] is for the status quo, and "Grand Juries" [6 (1860), 274] reprints an article from an English periodical, the Jurist, which is critical of attempts to abolish the institution and with which the editor of the Journal is in complete agreement.

[154] 1851, 14&15 Vic., c. 96 (Cda); 1857, 20 Vic., c. 59 (Cda).

[155] For example, see the letter from Hubert McDonald, a County Court Judge from Brockville, to Senator James R. Gowan (March 7, 1889, PAC, James R. Gowan Papers, microfilm, reel m 1938) in which McDonald cites several instances where grand juries have refused to bring in a true bill, after both crown attorney and magistrate have in effect committed individuals for trial.

[156] The first jurist to be openly critical of the grand jury is reported to have been Mr. Justice Gwyne of the Ontario Court of Common Pleas. At the Kingston Assizes in 1869, he told the Grand Jury that their "second preliminary investigation seems questionable," and that, in fact, they would be better employed following their own pursuits. Quoted in Kains, How Say You, p. 11. Kains was a lawyer from St. Thomas, Ontario.

[157] James Robert Gowan (1815-1909); born in Ireland, emigrated to Upper Canada with his parents; articled under James E. Small; served as a volunteer in the Rebellion of 1837; called to the bar in 1839. He was

appointed to the bench by the Lafontaine-Baldwin Government in 1843 and, at twenty-four, was the youngest judge ever commissioned in British North America. He retired from the bench in 1883 and was called to the Senate in 1885. For an interesting and informative biography of Gowan, see Mark W. Fisher, "Sir James Robert Gowan," Diss. University of New Brunswick, 1971.

[158] Arthur Colquhoun, The Hon. James R. Gowan: A Memoir (Toronto, 1894), pp. 22, 65-75; Fisher, "Gowan," p. 39. Although Gowan had changed his political allegiance from Tory to Reform Party in his early years (Fisher, "Gowan," p. 13), he was a dedicated and apolitical servant of the government in power during his judicial career. While he was John A. Macdonald's personal legal draftsman for well over thirty years, he was at the same time an intimate of Oliver Mowat and performed the same services for him. (See the correspondence between Gowan and Mowat, particularly Mowat to Gowan, July 8, 1876, in the James Small and James Gowan Papers, Archives of Ontario.) And if he was later to press Attorney General Thompson to codify the criminal law, it was no more than he was to do to Edward Blake, when the latter was Attorney General in the Mackenzie Government.

[159] Under the provisions of the Speedy Trials Acts of 1875 [38 Vic., cc. 45 & 47 (Cda)], persons charged with most indictable offences could elect to be tried summarily. Evidently many so elected.

[160] Canada, Senate, Debates, February 25, 1889, pp. 56-57; hereafter cited as Senate, Debates.

[161] Ibid., p. 57.

[162] Quoted in Kains, How Say You, p. 64.

[163] In 1879 and 1892, the Ontario Legislature enacted statutes regulating the composition and duties of grand juries. But no proclamation was issued to bring the statutes into force.

[164] For details see Kains, How Say You, pp. 63-64. The question was never resolved in a court. Jurisdiction remained with the Provinces, most of which enacted legislation on grand juries well into the twentieth century. In Ontario, for example, the last such statute was the Juries Act, 1974, S.O., c. 63, ss. 48, 49.

[165] Macdonald to Gowan, January 24, 1885, Gowan Papers, reel m 1898.

[166] Thompson to Gowan, April 21, 1886, Gowan Papers, reel m 1938; Thompson to Gowan, May 25, 1886, ibid., reel m 1899.

[167] Senate, Debates, February 25, 1889, pp. 52-65.

[168] Ibid., pp. 66-68.

[169] Thompson to Gowan, March 11, 1889, Gowan Papers, reel m 1938.

[170] Gowan to Thompson, April 4 and April 19, 1889, PAC, Sir John

Sparrow David Thompson Papers, microfilm, reel c 9252; Thompson to Gowan, April 20, 1889, Gowan Papers, reel m 1938.

[171] Gowan to Macdonald, September 26, 1890, PAC, Sir John A. Macdonald Papers, microfilm, reel c 1600.

[172] Canada, Parliament, Sessional Papers, 1891, No. 66 "Correspondence Between the Department of Justice and the Judges Respecting the Grand Jury," p. 7.

[173] While discussing coverage of the grand jury question in the press, Thompson commented to Gowan:

> On a matter like this I cannot help thinking that while the press may be of great service to us in helping to guide the public mind, *if we are able to come to the conclusion to abolish the present system*, it is of little value as indicating what ought to be done, in advance of our decision. (my italics)

November 26, 1890, Gowan Papers, reel m 1938.

[174] Senate, *Debates*, June 23, 1891, p. 105.

[175] Canada, Parliament, Sessional Papers, 1891, No. 66, "Judges Replies," pp. 6, 62-69. It is instructive to note that no replies from the provincial Attorneys General were published. What, one wonders, would their opinions have been?

[176] See Murdoch, *Epitome of the Laws*, I, 8-10; McAllister, "Legal Education," pp. 37, 39, 49; Gillis, "Legal Education in Ontario," pp. 102-05. This is just a representative sampling; many other publications could be cited which reflect the sentiments expressed above.

[177] John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979), pp. 6-7, 20-21.

[178] For a contemporary view of this process, see James M. Young, "The Faculty of Law," in *The University of Toronto and Its Colleges 1827-1906* (Toronto: University of Toronto Library, 1906), pp. 149-67. For a modern perspective, see Brian Bucknall, et al., "Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957," *Osgoode Hall Law Journal*, 6 (1968), 149-59.

[179] N.W. Hoyles, "Legal Education in Canada," *Canadian Law Times*, 19 (1899), 261-73. The Table of Variation is on p. 267.

[180] "Dominion Bar Society," *Canada Law Journal*, 13 (1877), 9.

[181] *Report of the Canadian Bar Association 1915* (no publication data), p. 1.

[182] Holdsworth, HEL, XV, 224.

[183] 1881, 44 Vic., c. 5, s. 74 (Ont.).

[184] Excepting British Columbia, all contemporary jurisdictions in

Canada continued to use "attorney" well into the twentieth century. British Columbia dropped the term in 1895; R.S.B.C., 1895, c. 24.

[185] In 1890 for example, incest was a misdemeanour in Nova Scotia, punishable by two years' imprisonment; a conviction in New Brunswick could result in fourteen, and in P.E.I. twenty-one years' imprisonment. In British Columbia it was a misdemeanour punishable by three years' imprisonment to conceal any relevant information from a registrar with intent to deceive, when registering a title to land. Such an action was not an offence elsewhere in Canada. Burbidge, Digest, Arts. 215, 456.

[186] 1869, 32&33 Vic., c. 36 (Cda), schedule B.

[187] Taschereau, Consolidation Acts, I, iv.

[188] Greaves, Criminal Law Acts, p. xxxvi.

[189] See Appendix 4.

[190] Piracy was also a capital crime. But Canadian admiralty courts which tried such offences sat under the authority of the Imperial Statute 1849, 12&13 Vic., c. 96, and charges were laid according to its provisions. For discussion, see Samuel R. Clarke and Henry P. Sheppard, A Treatise on the Criminal Law of Canada, 2nd ed. (Toronto: Hart & Co., 1882), p. 89.

[191] Canada, House of Commons, Debates, June 6, 1887, pp. 798-801; hereafter cited as House of Commons, Debates. See especially the remarks of David Mills, p. 801.

[192] Stephen, HCL, III, 367.

[193] R. v. Coote (1873), L.R. 4 P.C. 599. Not included are the appeals brought under the Canada Temperance Act, 1878, 41 Vic., c. 16 (Cda), which was not a criminal statute as such although it did provide for punishments.

[194] The question which concerned the Quebec Attorney General had to do with a conflict between a Lower Canadian and a Dominion Statute. R. v. Coote (1873), L.R. 4 P.C. 599 at 608. Their Lordships did not give judgement on this question however.

[195] R. v. Riel (1885), 10 App. Cas. 675 at 677.

[196] Frank Mackinnon, "The Establishment of the Supreme Court of Canada," Canadian Historical Review, 27 (1946), 270-72.

[197] House of Commons, Debates, March 16, 1875, p. 745.

[198] Robert Cassells, A Digest of Cases Determined by the Supreme Court of Canada (Toronto: Carswell, 1893), pp. 192-98.

[199] Reported criminal appeal cases heard in provincial courts 1867-1892:

N.S. Rep.	54
Ramsay's A.C. (Que.)	47
P.E.I. Rep.	2
N.B. Rep.	42
U.C.Q.B. Rep.	38
U.C.C.P. Rep.	15
Terr. L. Rep.	20
B.C. Rep.	7
O. Rep.	140

This is by no means an exhaustive list of reported cases, for many of the Reports of the time, such as the *Ontario Practice Reports* and *Quebec Law Reports* were not consulted once the trend was apparent. Nor were all criminal appeals reported, for as C.H. Stephens, the editor of *Ramsay's Appeal Cases* makes clear with respect to his own volume: "The number of unreported cases is unexpectedly large, comprising nearly, if not quite, one half of the total number of judgements in Appeal" (p. vi).

[200] This quotation is taken from a twenty-page brief prepared by Senator Gowan for Sir John Thompson some time in May, 1892. It is undated and unsigned. But there is a great deal of internal evidence to substantiate the date and to make its authorship unquestionable. Canada, Department of Justice, file 63/94, item 117.

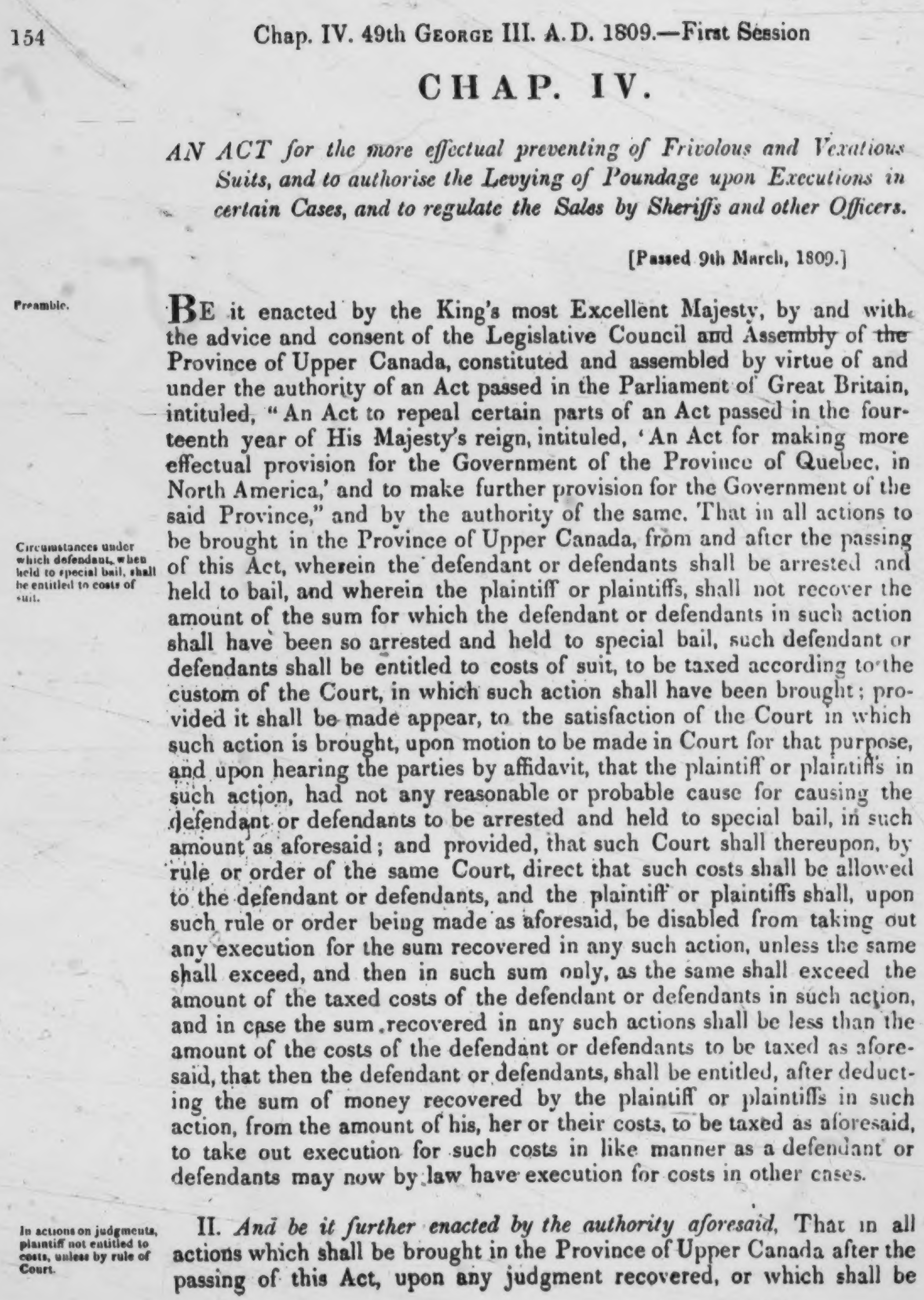
CHAPTER VII

Considering the fundamental differences between the British North American and English legal and constitutional systems, it could only be expected that the colonials would view attempts to systematize the law differently from their English contemporaries. And so it proved. So far as may be ascertained, there never was the deep-seated and continuing opposition to consolidation and codification which had been characteristic of the English experience, in spite of the fact that in the early Dominion Parliaments at least, there were proportionately more lawyers than in any Imperial Parliament.[1] However, before analysing the Canadian experience, it must be made clear exactly what the legislators were dealing with, in terms of statute law.

At the beginning of the nineteenth century, when all the contracting jurisdictions to Confederation had been in existence for several years, their statute books were indistinguishable from the English model. They were large folio volumes and at the top of each page were printed the year, the regnal year, usually in Latin words, and the chapter number, in upper case Roman numerals. Each statute formed one chapter, comprised of one or more sections, each consecutively numbered with upper case Roman numerals. Each section was one sentence. All but the first section began: "And be it enacted" or with words of similar import. These words were repeated from the phrase containing the enacting formula in the first section to ensure that the provisions in the sentence were covered by that formula.[2] Sections could be, and usually were, of interminable length, full of enumerations, exceptions, provisos, saving clauses and redundant words and expressions. Moreover, there was no attempt to break up the flow of words with internal subdivisions, such as sub-paragraphs or other independent clauses. A fair example of this style of writing is in section eight of Peel's Malicious Damage Act quoted above on page 131, even though it is of much later date, at a time when efforts were already being made to reduce surplusage.

A random sampling of colonial Acts reveals the same format and the same verbosity. Section one of the Nova Scotia Protestant Grantees Act[3] is a sentence of over seven hundred words, while in Lower Canada, the third section of the Letters Patent Act runs to nearly five hundred words (see Figure 1).[4] To make matters worse, there were no indexes in the sessional volumes, merely a randomly ordered list of titles which comprised the table of contents. It is thus not difficult to see that to search the statutes for authority or to find how the law stood on a particular subject would be an increasingly difficult task as the years went by and the volumes accumulated.

If the statutes were hard to work with, the common law was even more difficult. Decisions from which precedents had been drawn were scattered through the year books and reports of five centuries, and no one source contained them all. Moreover, case law was not as authoritative as statute, because precedents could be distinguished by counsel and judge and the meaning altered. Books of practice, which attempted to integrate the two sources, were monstrous tomes or multi-volume works and finding the information contained therein baffled even the experts.[5]



154 Chap. IV. 49th George III. A.D. 1809.—First Session

CHAP. IV.

AN ACT for the more effectual preventing of Frivolous and Vexatious Suits, and to authorise the Levying of Poundage upon Executions in certain Cases, and to regulate the Sales by Sheriffs and other Officers.

[Passed 9th March, 1809.]

Preamble.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, intituled, "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled, 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the Government of the said Province," and by the authority of the same. That in all actions to be brought in the Province of Upper Canada, from and after the passing of this Act, wherein the defendant or defendants shall be arrested and held to bail, and wherein the plaintiff or plaintiffs, shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the Court, in which such action shall have been brought; provided it shall be made appear, to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action, had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail, in such amount as aforesaid; and provided, that such Court shall thereupon, by rule or order of the same Court, direct that such costs shall be allowed to the defendant or defendants, and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only, as the same shall exceed the amount of the taxed costs of the defendant or defendants in such action, and in case the sum recovered in any such actions shall be less than the amount of the costs of the defendant or defendants to be taxed as aforesaid, that then the defendant or defendants, shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his, her or their costs, to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant or defendants may now by law have execution for costs in other cases.

Circumstances under which defendant, when held to special bail, shall be entitled to costs of suit.

In actions on judgments, plaintiff not entitled to costs, unless by rule of Court.

II. *And be it further enacted by the authority aforesaid,* That in all actions which shall be brought in the Province of Upper Canada after the passing of this Act, upon any judgment recovered, or which shall be

Figure 1. A page from an early nineteenth century Upper Canadian Statute consisting of mammoth, one sentance sections, each with its enacting formula.

Nova Scotia, whose legislature had been functioning since 1758, was the first jurisdiction to recognize and address the problem of the statutes. It had a backlog of 731 Acts when, following the lead of Westminster, it began effective reform in 1804. The next year Richard Uniacke, the Attorney General, promulgated the *Statutes at Large* of Nova Scotia, by order of the Assembly.[6] This is, as far as has been ascertainable, the first authorized collection of the statutes in any jurisdiction in the British Empire that has been found and it is to be noted that it antedated the first volume of *Statutes of the Realm* by six years. Like that collection, it is an elegant and accurate production, recourse having been had to the original Acts to compile it; and the statutes are ordered chronologically, from the first session of the Assembly. But it differs from the *Statutes of the Realm* in that only the titles and abbreviated headnotes of Acts repealed or expired are printed, with marginal notes to indicate subsequent amendments or additions to particular enactments. An alphabetical abridgement of the statutes in force is appended and an alphabetical index to the abridgement, in turn, refers the reader to the statute desired. The index is the earliest example of this feature in any volume of British North-American statutes which has been reviewed for this work. Three further volumes published in 1818, 1825, and 1835, and compiled on the same lines as the first, update the collection to 1835. However elegant these large volumes are and notwithstanding the fact that they are a great improvement on what had gone before, they are strictly conventional collections and use not only Ruffhead's title, but also his arrangement and lay-out, and are quite difficult to work with, unless one knows exactly what to look for.

Ten years after the first volume of Statutes at Large was issued in 1805, the Acts of the General Assembly of Prince Edward Island, 1773-1814, were published in Charlottetown in two volumes. The edition consisted of a reprinting of the statutes, year by year in chronological order, including the title and heading of repealed Acts, but omitting the text. There is an index of Acts, but it is not an inspiring collection and neither were the two volumes which followed it in 1836, nor those issued in 1852 which updated the collection to the latter year. There was one innovation in this set, however: it was apparently the first to break with the folio or near folio-size volume, being issued in a handy octavo format.

In 1838 the Acts of the General Assembly of New Brunswick appeared in one folio volume. This covered the period 1786 to 1836, and it is an elegant collection. It was ordered by the Assembly in 1835 and compiled and edited by George Berton, a barrister, working under the direction of the Chief Justice of New Brunswick.[7] A table of titles in chronological order precedes the Statutes, which are in the same order. Like the Nova Scotia collection, expired or repealed statutes are indicated only by a title and a short headnote, the disposition by a marginal note. Statutes in force are copiously annotated both as to content and subsequent disposition. It has the best index of any collection to that date, with main headings, sub-headings, frequent cross references, and a wide margin for notes on each page.

The collection titled Provincial Statutes of Upper Canada was published in strange circumstances. In 1817 a Joint Committee of the Legislative Council and Assembly recommended to their respective bodies that the Governor General should "direct proper persons" to revise and print one thousand copies of the Provincial Statutes.[8] There is no further mention of the project that year. Early in the next session, a whole series of parliamentary procedures culminated in a joint address to the Administrator requesting the revision and reprinting of the Statutes, to which he replied on March 6 that he would "order immediate measures to be taken" to comply with the request.[9] The next item in the Journal on the subject is an order of March 21 for Robert Horne, the printer of the Upper Canada Gazette, to attend at the Bar of the House to answer questions regarding an advertisement in the Gazette of March 19 which was "an infringement on the rights and privileges of this House."[10] In essence, the item indicated that the Legislature had authorized Horne to print additional copies of a collection entitled the "Revised Statutes" for sale to the public. Quite obviously he had not been so authorized and unless government moved much faster in those days than it does now, it is improbable that he had received direction even to revise and edit the Statutes, let alone print them. In the event, he was questioned, he apologized, and the assembly ordered him to publish in the Gazette the Proceedings of the House on the subject. So far as can be established, no publication was ever made in the Gazette or any other journal, and the Journal of the Assembly makes no mention of the subject again that year. Nor is there any further mention of statute law revision until 1825, when an abortive committee was struck to consolidate the Acts.[11]

Nevertheless, Horne did print the collection in 1818. The title page announces that they have been "Revised, Corrected and Republished by Authority" and the Administrator's name appears at the bottom of the page. In appearance and size, the volume is similar to the Statutes at

Large of Nova Scotia, as are the arrangement and chronological layout of the Acts and index. There is one innovation, however: where a statute has been amended, the addition or deletion is printed in italic type and a marginal note refers the reader to the amending enactment.

Much the same sequence of events led up to the publication of the next collection, entitled the Statutes of the Province of Upper Canada, which came out in 1831. Following the abortive request for a revision in 1825, a similar request was made in 1830, with a similar result.[12] There is no mention of any action in the Journal of 1831 until the receipt of a petition from two Kingston publishers for the House's patronage of a revised edition of the Statutes just off their press.[13] This precipitated a squabble with the King's Printer, the striking of a Committee, and a Report which recommended the purchase of two hundred copies of the privately printed collection, despite the objections of the King's Printer.[14] Apart from bringing the Statutes up to 1830, and being set in a clearer type, this collection is similar in arrangement and layout to its predecessor of 1818, and ten more years were to pass before the legislature enacted statutes similar to the British consolidation acts.

This innovation was made to implement the policy which had brought about the Act of Union. For example, one of the first bills enacted in Sydenham's Parliament of 1841 was a measure to consolidate and integrate all former Lower and Upper Canadian statutes relating to customs and excise and then to repeal such acts.[15] It was closely followed by the criminal law bills introduced and managed by the learned jurist, Henry Black, which consolidated the penal statutes of the two jurisdictions.[16]

Just prior to the legislative activity of 1841, a new move to publish an official revised edition of the Upper Canada Statutes had been initiated. The fact that the aim of the revision was to show the statute law of the Province as it was at the time of Union was probably the reason the attempt was much more businesslike than those of the past, and entirely successful.[17] The initial request from the Assembly was made January 9, 1840; by July 25, Commissioners had been appointed and were at work. In part, their instructions were to

> examine and revise the several Statutes from time to time passed, and enacted by the Parliament of Upper Canada, and then in force and effect; and to make such report upon the premises, as in our opinion should be most for the interest, welfare and good government, of the Province.[18]

Less than three years later the revision was issued. It was published in two large volumes, the first containing public Acts and the second private, and was entirely conventional in layout and arrangement, for reasons the Commissioners' Report makes clear:

> Before proceeding to execute this Commission, we ascertained that what was contemplated by the Government was, that we should present the Statute Law of Upper Canada as it stood at the time of the Union of the Provinces, having expunged all such parts as had been repealed, either expressly or by clear implication; carefully revising the whole; giving the necessary references in the margin of each Statute; and adding a well compiled index.[19]

However, they had previously given some thought to classifying and consolidating the Acts and then arranging the consolidations in a topical order, but they decided against such a procedure because they were not sure they had a mandate to do so; furthermore, their revision would then have required legislative approval during a prolonged or extra session of the Legislature. The Report continues:

> Such a re-casting of the Statute Book, by classifying the whole, according to the various subjects, without regard to the order of time, has been frequently proposed in the Mother Country, but never yet attempted, nor has it, so far as we know, been effected in any of the British Colonies, though it has been in some other Countries.[20]

In view of this statement, it may be that the Commissioners were surprised when the first Report of the Commissioners appointed to revise the Statutes of Lower Canada was published a few days later.

So far as may be determined, no statute law revision of the British North American variant had ever been proposed or carried through in Lower Canada prior to 1841. In that year, for the same reason which had made the Upper Canada revision necessary, the newly elected Assembly of the Union requested the appointment of a commission to revise the statute law of Lower Canada. But the instructions to the Lower Canadians read somewhat differently from those which had been issued to the Upper Canadian Commission. In part, it was specified that they were to

> examine and revise the several Statutes and Ordinances from time to time passed, and enacted and ordained in that part of the Province formerly called Lower Canada, and now in force and effect, and to consolidate such of the said Statutes and Ordinances as relate to the same subjects or can be advantageously consolidated.[21]

Here was a clear mandate to change the form of the statute book, but while the Commissioners did so, they moved in a cautious and most conservative manner. In their first Report dated March 21, 1843, they stated that they had determined which of the 3300 enactments in the statute book had been repealed and which were in force and that they had arranged the latter under suitable subject headings, with the intention of consolidating like material.[22] However, for reasons which seem tenuous, they backed away from consolidation and stoped instead at a halfway house. There, the ghosts of Justinian's Commissioners might have been peering over their shoulders as they deliberated because what they produced approximated the layout of The Code. There was a proper table of contents--the first in any British North American collection--with ten topical headings, beginning with "The Constitution . . ." and including penal laws, real property provisions, and so on (see Figure 2).[23] In the body of the volume, Acts or parts of Acts bearing on the same subject were set out under an appropriate rubric, following a rational sequence. But there was no change in the content; each law was set out verbatim as it had been enacted. The pages were not as cluttered as in the past, however, because the regnal year of the Act and the chapter number had been shifted from the centre of the page to the margin and printed in small type, and all mention of repealed acts had been omitted. The index was comprehensive and easy to use. As their model for layout, format and size, the Commissioners chose the Revised Statutes of Massachusetts, and so introduced the octavo volume to Canada.[24] While the Commissioners from Lower Canada had not gone the whole way, they had made a break with the past and pointed the way to the future. Other jurisdictions soon followed their lead.

New Brunswick was the first to do so. In 1849, Lemuel Wilmot, the Attorney General and first Premier of the colony introduced four bills in the Assembly to consolidate all the penal statutes and to codify the provisions relating to felonies and misdemeanours. The codification was accomplished by the Indictable Offences Act.[25] Its opening pages were entirely conventional in size and format, and much of the content of the following pages had been developed in New Brunswick. But the format of the latter pages was closely modelled on Lord Brougham's draft bill of 1848. The two styles in such close juxtaposition provide a startling contrast. Specifically, the first section of the Act covers well over two pages and runs on interminably in a sentence of 1500 words or more

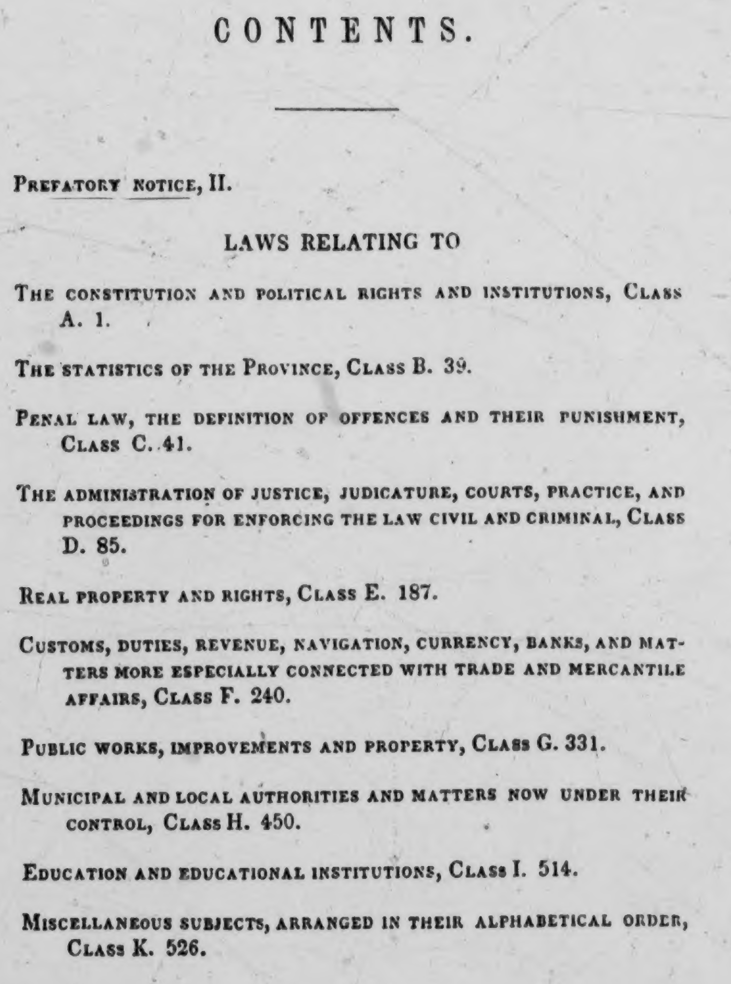


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Figure 2. The first topical Table of Contents in British North America page xiv of The Revised Acts and Ordinances of Lower Canada.

and employs the conventional words of enactment. The fourth page is an abbreviated copy of Brougham's topical table of contents, often verbatim, and sets out the material covered by chapter, section, and article. There are no words of enactment in any of these divisions.[26] The chapters are numbered consecutively in Roman numerals, while the Arabic numbers of the sections and articles each start at one within their respective subdivisions. Thus, sections and articles could be added or deleted or otherwise amended without disarranging the general numbering.

The New Brunswick draftsmen eliminated many of the explanations and definitions of the Imperial model, abbreviated the detail, and did not include a chapter of specific punishments. Hence, while they did follow the wording of the English bill in many substantive clauses, their articles, which still consisted of one sentence, were more conventional than those of the model (see Figure 3). For example, the article on riotous destruction of property, one of the longer passages in Brougham's draft, reads as follows:

> If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine, for sinking, draining or working any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine, every such offender shall incur the penalties of the 4th Class,[27]

a sentence of 162 words. The analogous section in the New Brunswick legislation states that

Indictiable Offences Act 1849, 12 Vic., c. 29 (N.B.), p. 32.

> If any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force, demolish, pull down or destroy, or begin to demolish, pull down, or destroy any church, chapel, or meeting house, stable, coach house, out house, warehouse, office, shop, mill, malt house, barn, or granary, or any building or erection used in carrying on any trade or manufacture or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, any such offender shall be guilty of Felony, and shall be liable to be imprisoned for any term not exceeding fourteen years.[28]

for a saving of thirty-seven words. In terms of substantive law there was little or no change in content. But this Act made a real break with the past and radically altered the form of the statute book, giving it the appearance of a modern legal text.

One drawback to this legislation was that it made citation difficult, since the chapter in the statute book would tend to become confused with chapters in the code. When referring to the offence of rape, for instance, a full citation would read: Indictable Offences Act, 1849, 14 Vic., c. 29; c. 1, s. 2, art. 10. And this was no mere technical quibble, for the English Commissioners who revised Sir James Fitzjames Stephen's Draft Criminal Code in 1878 made the point at length that they had changed Stephen's similar format "in order to avoid the use of the word 'chapter' as the name of a sub-division of what might itself ultimately become a chapter of the statute book."[29]

This problem was solved by Nova Scotia. In the same year in which the New Brunswick Acts were promulgated, the Council and Assembly of Nova Scotia resolved unanimously that the statutes of the Province "be consolidated, simplified in their language and republished in one uniform code," and requested the Lieutenant-Governor to issue a Commission to implement their resolution.[30] Accordingly, four lawyers were appointed, two of whom were members of the Legislature.[31] They soon found that one of their major problems was that:

> Every variety of style . . . is to be found in the statutes that remain in force, from the terseness and vigour which distinguish some few of the enactments, to the verbiage and interminable periods, which render it a hopeless task to find out the meaning of too many of the others.[32]

To rectify this situation, the Commissioners considered eliminating repealed statutes and parts thereof and printing the remainder in chronological order, as had been done in Upper Canada, or arranging them in a topical order, as in Lower Canada. They rejected both courses as falling "far short of what the legislature obviously contemplated and what we ourselves desired."[33]

Instead, they took the Revised Statutes of Massachusetts and of New York as their models.[34] These comprised the entire public statute law of each jurisdiction. They were written in a short, concise, non-technical style and set out the law in one or two volumes in an integrated and topical layout. While the resemblance between the models and the Nova Scotian derivative is pronounced in matters of layout and style, the Commissioners remarked that the laws of those two jurisdictions "have offered us little or no assistance"; the form was foreign, the substance Nova Scotian.[35] Working with these guidelines and with the knowledge that the legislature "expected that the new code should present the law, in all essential particulars as it was,"[36] they produced the code in one octavo volume in 1851. It subsumed the content of 750 repealed statutes and thus contained all the public statute law of the Province.[37] A topically ordered table of content made it easy to find any given subject and revealed that the code was divided into four parts, forty-one titles, 170 chapters, each of which consisted of one or more sections, and ran to 578 pages (see Figure 4).[38] In particular

Revised Statutes of Nova Scotia, 1851, p. 443.

Part Four, which comprised fifteen chapters, set out the whole of the statutory penal law.

While this was a notable innovation in that it was the first occasion when all substantive and procedural criminal law of a jurisdiction was integrated in one systematic treatment, the task had been made somewhat less demanding than would otherwise have been the case by liberal borrowings from the New Brunswick Acts of 1849.[39] The parts and titles are numbered consecutively in Roman numerals, while consecutive Arabic numerals denote the chapters. Each chapter is summarized by a short, descriptive headnote, and the sections within each chapter are marked off in Arabic numerals beginning at one. There are no regnal years anywhere in the volume and no words of enactment, except for the first sentence of the work: "Be it enacted by the Lieutenant-Governor and Assembly, as follows." The Commissioners were able to introduce this innovation by virtue of a special statute enacted by the Legislature in 1851 in emulation of Lord Brougham's Act of the previous year.[40] Contrary to their expressed intention, the Commissioners did recommend some substantive amendments which "became unavoidable in the work"; these were noted in the margin of the draft bills. Unlike the contemporary situation in England, however, the Commissioners who were also members of the Council or Assembly, could explain and defend their proposed changes when the Code came up for debate in those chambers.

Although the Code was a great advance on what had gone before, it was not without defects. While the draftsmen did a commendable job of compression in the new style, they also preserved the traditional English form of the section. It was still one sentence with no subdivisions and in the penal chapters, one still had to read to the end of the sentence to discover the class of crime and the punishment. Much was still left to the common law: there were no definitions of important terms such as larceny, murder, and the like; several major offences remained unenumerated, such as sedition and piracy. This was not a satisfactory situation since such words and concepts were defined by the bench by reference to the common law as the need arose; and with a judge's ability to distinguish, such definitions were by no means uniform.[41]

While change in these details would have been desirable, one should not lose sight of what had been accomplished. The Revised Statutes of Nova Scotia is an elegant and innovative work which made the whole of the public statute law accessible to all. It has a modern, functional appearance and a clear, concise and uniform style which makes it relatively easy to read and comprehend. Indeed, its chapter format became the model for all subsequent Nova Scotian statutes.[42] Finally, the Legislature ensured that there would be no confusion between the chapter of the enacting statute and the chapters of the Code by laying down that the work was to be cited as the "Revised Statutes," followed by chapter and section.[43]

This innovation was copied by New Brunswick in the Revised Statutes of that Province, which were enacted in 1854.[44] In the year the Nova Scotian code was published, the Lieutenant-Governor of New Brunswick, responding to an address from the legislature, appointed a commission of three lawyers, two of whom were members of the Assembly, to "consolidate, simplify in their language, revise and arrange in one uniform code, the Acts of Assembly . . . ." The Commissioners followed much the same procedure as had their colleagues in Nova Scotia. They also used the same model but achieved even greater brevity, using only forty-three words, for example, to lay down the law concerning malicious damage to structures under the rubric "riotously pulling down buildings."

> Any person who shall unlawfully and maliciously pull down or destroy, or begin to pull down or destroy any building, bridge, or other erection or machinery therein, shall be guilty of felony, and shall be imprisoned for a term not exceeding fourteen years.[45]

Not surprisingly, the resulting octavo volume of 577 pages was similar to that of its sister province in appearance and content, but it was slightly smaller in size. It, too, was divided into parts, titles, chapters and sections, and the chapters were supplied with headnotes. Substantive and procedural criminal law were systematized and formed the fourth Part of the code. Regnal years disappeared, words of enactment were omitted from all but the first paragraph, and all previous public statutes were repealed. As in Nova Scotia, the new format became the model for all subsequent statutes.

It is thus evident that the draftsmen of both maritime provinces had achieved a compression of the law and an economy of style that could only have made Sir James Fitzjames envious. Furthermore, their bills became law twenty-five years before Stephen's Draft Code was read the first time.

Legislation in the Province of Canada had begun to alter the format of the statutes well before any such action was taken in the maritimes. In the Common Schools Act of 1843, sub-paragraphs were introduced in sections of the Statute. They were identified by a large Arabic numeral and each consisted of a sentence closed by a period.[46] Section XIV, for example, had five such divisions which, together with the introductory matter at the beginning of the section, totalled over 350 words. It is thus apparent that although it was a clumsy method of dividing up a section, it made the material much easier to read and cite than the same words in the traditional "one section, one sentence" format. On the other hand, there was no success in bringing system to the penal statutes. In 1850, a year after Premier Wilmot's codification of the criminal law was enacted in New Brunswick, William Badgley, M.L.A. for Missisquoi, introduced two bills in the Assembly to effect a similar codification in Canada. He told the House that the measures had been drafted from Canadian and English statutes and the codes of neighbouring States of the Republic, and that his object was to have them read a second time _pro forma_, and referred to a Select Committee. Its report could then be digested over the recess and so form the basis of informed debate when the bills were reintroduced in the next session.[47]

Badgley had been Attorney General in the Tory administration of Henry Sherwood and at the time he brought in his criminal law bills, he was the well informed and articulate Leader of the Opposition in the Reform administration of Baldwin and Lafontaine.[48] It may be that this had a great deal to do with the fate of his bills. At any rate, in debate both Lafontaine and Baldwin refused to accept Badgley's proposal on the grounds that it would commit the Government to the principle of the measure. Accordingly, second reading was postponed and nothing more was heard of the legislation in that Session.[49] Nothing daunted, Badgley introduced the bills in the next Session, during the first year of the Hincks-Morin administration. This time they got through second reading and went to a Select Committee. Its Report reviewed at length the sorry state of the criminal law in the Canadas and praised Badgley's bills. Nevertheless, the Committee refused to endorse them as they stood, but recommended that a Commission be appointed to revise them for subsequent consideration by the Assembly. Badgley so moved, the motion was passed, but that was the last that was heard of the matter.[50]

In this period of legal ferment in Great Britain and the maritimes, the Legislature again turned its attention to the format and style of the statutes, although no mention of these matters has been found in the Debates. In 1852, the sessional statutes were issued for the first time in a quarto volume. On the pages within, the title of an act was printed at the centre of the head of each page it occupied. The year, regnal year, and chapter number, all in Arabic numerals, were shifted to the edges of the head of the page. Sub-paragraphs began to be punctuated with semi-colons in 1854 and this was also the first year in which enacting words were omitted from all but the first section of a chapter. In the session of 1855, a bill in the style of Brougham's Act of 1850 was passed, which laid down that the preamble to Acts would be shortened, standardized, and placed at the head of each measure after which "the various clauses of the Statute shall follow in a concise and enunciative form."[51]

At the beginning of the same session a petition from the Municipal Council of Lanark and Renfrew requesting a general revision and simplification of the law was read in the Assembly.[52] It was not the first time such a request had been made; in fact, similarly worded petitions had been a feature of several preceding sessions,[53] for by this time, there were on the statute books about 4700 Acts of the Provincial Parliament and its two predecessors.[54] In answer to such petitions, the legislators eventually responded in 1851 by moving an address for the issue of a Commission for the revision and consolidation of the statute law of the three jurisdictions, but to no avail.[55] In 1856, however, the Attorney General of Upper Canada, John A. Macdonald, responded to the motion in the session of 1855 by appointing six lawyers "to examine, revise, consolidate and classify the Public General Statutes of Upper Canada" and, in conjunction with commissioners to be appointed from Lower Canada, to effect a similar review and revision of the Provincial Statutes.[56] Six Lower Canadians were duly appointed with similar terms of reference for their jurisdiction. Of the total of twelve Commissioners, four were Members of the Assembly, and so would be able to advocate and explain their work when it came before the House for legislative sanction. When that occurred, it was unlikely that the legalists in the Assembly would be opposed to the measures for, if the editorial writer of the Upper Canada Law Journal in any way reflects the opinion of the profession, they were just as much in favour of a thorough revision as the individuals and organisations which had begun the process with their petitions. Quoting Richard Brinsley Sheridan, he said that when a bill imposing a tax is enacted and is followed by

> -a bill to amend the bill that imposed the tax,-a bill to explain the bill that amended the bill that imposed the tax,-a bill to remedy the defects of the bill that explained the bill that amended the bill that imposed the tax; and such measures [continue] ad infinitum, it is time to reduce and consolidate.[57]

As in the maritime provinces, the Commissioners reviewed the work of codified jurisdictions in the United States and the drafts of the Imperial Commissioners, and also the codes of Nova Scotia and New Brunswick. While the two latter codes were of considerable interest to the Commissioners, they pointed out that their terms of reference were different from those issued in the maritimes.[58] Inevitably then, their work would assume a different form. They first of all developed a logical topical order which was similar for each of the three jurisdictions, classified the Acts according to the order, and then proceeded to consolidate the statutes pertaining to a particular topic in accordance with guidelines set by John A. Macdonald.[59] This process is described in detail in the first Report of the Commissioners for Upper Canada which, accompanied by a draft of the Upper Canada revision, was submitted to the Cabinet during the session of 1858 by the Chairman, James B. Macaulay.[60] However, both the Report and subsequent letters from Macaulay made clear that it was by no means complete and that the manuscript of the Provincial volume was still with the printer.[61] It, too, was not in its final form, especially in the area of the criminal law, where more work was needed to make it uniform across the Province. To accomplish the work in time for the volumes to be considered in the next session (1859), the Upper Canadian Commission would have to be reorganized, since all but Macaulay had returned to private practice after the completion of the current drafts.

To resolve the questions he had raised, Macaulay met with the Attorney General, who suggested that Judge Gowan, who had recently drafted the Crown Attorney's Act and the Common Law Procedures Act, would be a zealous and efficient commissioner.[62] Accordingly, Macaulay requested the services of Gowan; he was appointed, and the two men got down to the task of revising and correcting the drafts.[63] They were ready for enactment early in 1859. On March 4, Attorney General Macdonald moved first reading of bills to consolidate the Statutes of Upper Canada and of the Province of Canada, the first of which contained

1377 and the second 1299 pages. They were given second reading on March 8 and sent to a Select Committee. One month later the Committee reported the Bills, as amended. On April 12, after what must have been only a perfunctory examination, the Committee of the Whole House reported the bills without further amendment and they received third reading the next day. Royal assent was given on May 14.[64]

Considering the size and complexity of the legislation, the bills went through smoothly and expeditiously and no evidence has been found to suggest that there was any opposition to the measures. How was this done? According to that astute observer, Judge Gowan:

> Sir John Macdonald, when the vols of the Consolidated Statutes were submitted to the old Parliament of Canada, had a representative committee appointed; he told them candidly it would take a quarter of a century in such a body following the usual rules to go over and test the correctness of the matter presented--he enlarged upon the advantages of having the whole stat[ute] law better expressed and condensed into a small compass and he suggested taking up some bit, testing that and judging the rest by it--an ex pede Herculum appeal--and so it was done--he got his measure through. . . .[65]

But even a political magician like Macdonald could not have performed this trick if members of the Committee such as Antoine Dorion or Oliver Mowat had been inclined to oppose the legislation, as the English experience demonstrates.

No one was so inclined. There were several reasons for this complacency. To begin with, only the members from Upper Canada had much interest in the matter, or at least in the public and private law, for in accordance with an Act of 1857, a Commission was already at work on the Civil Code of Lower Canada which, when completed, would "embrace all the present statutes of joint application [i.e. Provincial Statutes] except those of a criminal nature."[66] They were timely measures as well and would keep Canada abreast of developments in the maritimes and anticipate the codification of English law, which was expected at any moment.[67] Moreover, the Bills were not an alien importation; they had been drafted in large part by sitting members. But perhaps the main reason for the absence of opposition was that, except for matters of non-substantive detail or the reconciling of conflicts in statutes which dealt with the same matter in different ways, there was no amendment of the law. No punishments were changed; no old rights were abrogated nor new rights created. As in the maritimes, Canadians did not want change; they wanted compression and systematization.

This is precisely what the Commissioners gave them, as their Report makes clear:

> [W]e should attempt an effectual consolidation without deviation from the original text when the language is explicit and concise, and only expunging or recasting where it appears that partial alteration or greater brevity may be safely adapted without afflicting the import and meaning of the original Statute.[68]

But while they did achieve compression, there was no change in style, as another comparison of the section on riotous destruction of buildings will illustrate. Section six of the Malicious Damage Act of 1841 reads as follows:

> And be it enacted, that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church, chapel, or meeting house, for the exercise of any mode or form of religious worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned at hard labour in the Provincial Penitentiary for the term of his natural life, or for any term not less than two years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years.[69]

The relevant section of the Consolidated Statutes renders this as:

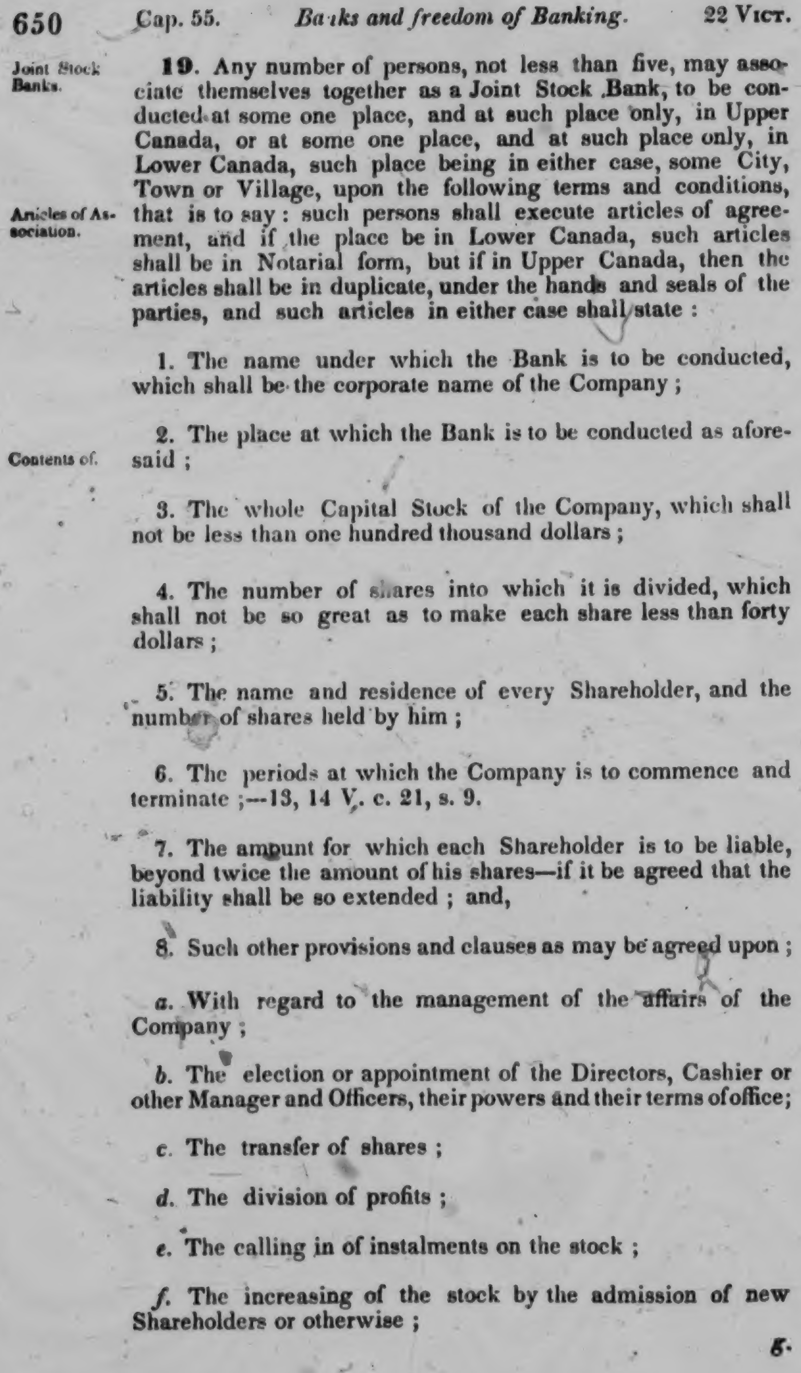
> If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down or destroy any church, chapel, or meeting house, for the exercise of any mode or form of religious worship, or any house, coach-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, every such offender shall be guilty of felony, and shall be imprisoned in the Penitentiary for the term of his natural life, or for any other term not less than two years, or be imprisoned in any other prison or place of confinement for any term less than two years.[70]

Thus the original is pared down by twenty-five words. But the retention of this style also meant that definitions and several specific offences were left to the common law.

One area where the Commissioners were able to make a considerable improvement was criminal procedure. Where possible, they extricated such details from substantive enactments and transposed them to a more appropriate place in the volume. For example, the Malicious Damage Act of 1841 has forty-two sections. Of these the substance of ten, that is nearly 25%, were integrated with the procedural chapters, by now almost wholly Canadian, in the Consolidated Statutes.[71]

The work is divided into eleven titles, twelve sub-titles, 111 chapters and has three comprehensive schedules which detail the disposition of all Acts consolidated, in a total of 1377 pages. As in the maritime legislation, the final division--Title Eleven--set out the criminal law, which formed a sub-code of twenty-three chapters and 257 pages. However, it was not a continuous text as were the Nova Scotia and New Brunswick codes. Each chapter stood alone. It was a separate statute complete with title and enacting words. For this reason and because its provisions had not been written from first principles but were, in fact, merely abridgements of former statutes, its length was more than twice that of the two maritime codes. On the other hand, with the publication of the Consolidated Statutes of Canada and its companion volumes for Upper Canada in 1859 and Lower Canada in 1860, the statute book took on its modern form. For these collections introduced the use of heavy type Arabic numerals to denote sections, light type to mark off sub-paragraphs, and sub-sub-paragraphs identified by lower case letters of the alphabet, made their first appearance (see Figure 5).

By the time of Confederation, all the British North American colonies excepting Prince Edward Island and British Columbia had accomplished what the Chancellors of England from Henry VIII's time had never been able to achieve.[72] They had managed to consolidate and codify the public statute law of each jurisdiction and to repeal all that had gone before. And part of each code was a sub-code of criminal law which ranged from the brief eighteen chapters and fifty pages of the Revised Statutes of New Brunswick to the relatively ponderous twenty-two chapters and 257 pages of the Consolidated Statutes of Canada, which were supplemented by over four hundred pages of "provincial" provisions in the codes of Lower and Upper Canada. But the codifications had done more than cut down the bulk of the law and arrange it systematically. They had introduced, on the largest scale possible, styles of drafting which vastly increased the accessibility and readability of the law or, indeed, of any piece of administrative writing. As such the codes became models for all similar writing in the community at large.



650 Cap. 55. *Banks and freedom of Banking.* 22 Vict.

Joint Stock Banks.

19. Any number of persons, not less than five, may associate themselves together as a Joint Stock Bank, to be conducted at some one place, and at such place only, in Upper Canada, or at some one place, and at such place only, in Lower Canada, such place being in either case, some City, Town or Village, upon the following terms and conditions, that is to say: such persons shall execute articles of agreement, and if the place be in Lower Canada, such articles shall be in Notarial form, but if in Upper Canada, then the articles shall be in duplicate, under the hands and seals of the parties, and such articles in either case shall state:

Articles of Association.

1. The name under which the Bank is to be conducted, which shall be the corporate name of the Company;

2. The place at which the Bank is to be conducted as aforesaid;

Contents of.

3. The whole Capital Stock of the Company, which shall not be less than one hundred thousand dollars;

4. The number of shares into which it is divided, which shall not be so great as to make each share less than forty dollars;

5. The name and residence of every Shareholder, and the number of shares held by him;

6. The periods at which the Company is to commence and terminate;—13, 14 V. c. 21, s. 9.

7. The amount for which each Shareholder is to be liable, beyond twice the amount of his shares—if it be agreed that the liability shall be so extended; and,

8. Such other provisions and clauses as may be agreed upon;

a. With regard to the management of the affairs of the Company;

b. The election or appointment of the Directors, Cashier or other Manager and Officers, their powers and their terms of office;

c. The transfer of shares;

d. The division of profits;

e. The calling in of instalments on the stock;

f. The increasing of the stock by the admission of new Shareholders or otherwise;

g.

Figure 5. The forerunner of the format used in modern statute books: a page from the Consolidated Statutes of Canada, 1859.

NOTES TO CHAPTER VII

[1] See Appendix 6.

[2] Holdsorth, HEL, II, 440; 1850, Lord Brougham's Act 13&14 Vic., c. 21, s. 2 (Imp.).

[3] 1759, 33 Geo. 2, c. 3 (N.S.).

[4] 1796, 36 Geo. 3, c. 3 (L.C.).

[5] Stephen, HCL, II, 218, note.

[6] Nova Scotia, House of Assembly, Statutes at Large 1758-1804 (Halifax, 1805), ix.

[7] New Brunswick, Acts of the General Assembly (Fredericton: Queen's Printer, 1838), Preface.

[8] Upper Canada, House of Assembly, Journal, April 2, 1817, p. 416.

[9] Ibid., March 6, 1818, p. 499.

[10] Ibid., March 21, 1818, p. 543.

[11] Ibid., November 5, 1825, p. 9.

[12] Ibid., February 9, 1830, p. 46; February 19, p. 61.

[13] Ibid., December 5, 1831, p. 30.

[14] Ibid., December 15, 1831, p. 121.

[15] 1845, 4&5 Vic., c. 15 (Cda).

[16] Gibbs (née Nish), Debates of the Legislative Assembly, I, August 27, 1841, 710-11, 713, 127.

[17] Canada (Province), Statutes, Statutes of Upper Canada (Toronto, 1843). The Report of the Commissioners (I, pp. 1-3) is dated March 8, 1843.

[18] Ibid., p. 1.

[19] Loc. cit.

[20] Loc. cit.

[21] Canada Gazette, March 21, 1842, p. 248.

[22] Canada (Province), Statutes, Revised Acts and Ordinances of Lower Canada (Montreal, 1845), p. iii; Canada, Legislative Assembly, Journal,

1843, Appendix O.O., p. 1.

[23] Canada (Province), Revised Acts of Lower Canada, p. xiv.

[24] Canada, Legislative Assembly, Journal, 1843, Appendix O.O., p. 3.

[25] 1849, 12 Vic., c. 29 (N.B.).

[26] The New Brunswick Act borrowed Brougham's phrase to cover the substantive provisions: s. 2 reads, in part, "And be it enacted, that the Schedule to this Act annexed, shall be deemed . . . to be parcel to this Act . . . as if such [schedule] had been expressly . . . recited with the usual words and in the usual forms of enactment . . . ." Cf. Great Britain, Parliament, Parl. Pap., Fourth Report on Criminal Law, 1848 [940], XXVII, p. 70.

[27] Ibid., p. 116.

[28] 1849, 12 Vic., c. 29; c. 5, s. 1, art. 6 (N.B.).

[29] Great Britain, Parliament, Parl. Pap., Report of the Royal Commission on Indictable Offences, 1878-79 [2345], XX, 14.

[30] Commissioners' Report, R.S.N.S. 1851, p. vii.

[31] William Young was an M.L.A. and Speaker of the Assembly; Jonathan McCully was an M.L.C. DCB, pp. 435, 820.

[32] R.S.N.S. 1851, p. viii.

[33] Loc. cit.

[34] Loc. cit.

[35] Loc. cit.

[36] Ibid., p. ix.

[37] Ibid., p. xii.

[38] Ibid., pp. xv-xxi.

[39] Ibid., p. x.

[40] The Act is not included in the Statutes of the session and is identified only by the date of its enactment--April 7, 1851; ibid., p. v. For Lord Brougham's Act, see above, Chapter 5, note 185.

[41] As an example of the potential developments when the definition of an important term was left to a judge, see Desmond Brown, "The Craftsmanship of Bias: Sedition and the Winnipeg Strike Trial 1919," Manitoba Law Journal, 14 (1984), 1-33.

[42] R.S.N.S., 1851, p. xii.

[43] Ibid., c. 170, s. 2.

[44] R.S.N.B., 1854, c. 162, s. 13. The content of the remainder of this paragraph is derived from the New Brunswick Commissioners' Report of March 22, 1853; ibid., pp. vii-xv.

[45] Ibid., c. 147, s. 1.

[46] 1843, 7 Vic., c. 29 (Cda). So far as can be ascertained, this is the first appearance of this innovation in any British jurisdiction. Sub-paragraphs were not seen in English statutes until Lord Thring introduced them a decade later in 1854; Ilbert, Legislative Forms, p. 69.

[47] Gibbs (née Nish), Debates of the Legislative Assembly, IX, 1139-41.

[48] DCB, XI, 41.

[49] Gibbs (née Nish), Debates of the Legislative Assembly, IX, 1141.

[50] Ibid., X, 1276, 1632.

[51] 1855, 18 Vic., c. 88, s. 2 (Cda).

[52] Canada, Legislative Assembly, Journal, February 28, 1855, p. 603.

[53] Canada, Legislative Assembly, General Index to the Journals of the Legislative Assembly 1841-1851, p. 508; 1851-1866, p. 827.

[54] Canada, Legislative Assembly, Journal, 1859, Appendix No. 9. First Report of the Commissioners appointed to revise and consolidate the Statutes of Upper Canada. Note that Appendix 9, which consists of the First Report and Supplementary Report with a total of thirty-two pages is unpaginated. For Lower Canadian statistics, see the Second Report of the 1843 Commission printed in Revised Acts and Ordinances of Lower-Canada, p. vi.

[55] Canada, Legislative Assembly, Journal, July 11, 1851, p. 156.

[56] Ibid., September 28, 1854, p. 132; 1859, Appendix 9, First Report.

[57] Editorial, Upper Canada Law Journal, 4 (1858), 147; see also pp. 124-25.

[58] Canada, Legislative Assembly, Journal, 1859, Appendix 9, First Report.

[59] According to the then Senator Gowan the Commissioners' "first process in drafting the revision was to strike out all the unnecessary words in an enactment," in accordance with Arthur Symons, Mechanics of Lawmaking [London, 1835]. But Macdonald did not approve "and so we had not the free hand, as draftsmen we desired." They also produced a much

thicker volume than would otherwise have been the case. Gowan to Thompson, November 9, 1892, Thompson Papers, reel c 9259.

[60] Macaulay to Macdonald, April 23, 1858, Macdonald Papers, c 1707. Macaulay (1793-1859), a former Chief Justice of the Court of Common Pleas, had also been a member of the Commission which had drafted the 1843 edition of the Revised Statutes of Upper Canada. He was knighted for his work on the 1859 edition and died soon thereafter.

[61] Macaulay to Macdonald, May 29, 1858; May 31, 1858 (two letters this day), Macdonald Papers, reel c 1707.

[62] Macdonald to Gowan, January 31, 1857, J.K. Johnson and Carole Stelmack, eds., The Letters of Sir John A. Macdonald, January 31, 1857, I, 421; February 5, 1858, II, 18.

[63] Macaulay to Macdonald, May 31, 1858, Macdonald Papers, reel c 1707.

[64] Canada, Legislative Assembly, Journal, 1859, pp. 151, 169, 343, 379, 590.

[65] Gowan wrote this on April 21, 1892 to Justice Minister Thompson in a letter of advice on the tactics which should be employed to put through the Criminal Code; Thompson Papers, reel c 9257.

[66] Unfortunately, this important and interesting development is beyond the scope of this study, but those who wish to learn about its historical development could not do better than to read John Brierley's informative "Quebec's Civil Law Codification," McGill Law Journal, 14 (1968), 521-89.

[67] Oliver Mowat to Macdonald, December 1, 1856, Macdonald Papers, reel c 1673.

[68] Canada, Legislative Assembly, Journal, 1859, Appendix 9, First Report.

[69] 1841, 4&5 Vic., c. 26, s. 6 (Cda).

[70] C.S.C., 1859, c. 93, s. 5.

[71] Seven went to c. 99, procedure in criminal cases, and three to c. 103, summary convictions. C.S.C. 1859, Schedule B, p. 1210.

[72] Although Commissions to revise the statutes of Prince Edward Island were issued in 1861 and 1890, and Reports from the Commissioners were published, no legislative action to implement a revision was taken until the Revised Statutes of Prince Edward Island were enacted in 1951 [Olga B. Bishop, Publications of the Governments of Nova Scotia, Prince Edward Island and New Brunswick (Ottawa: National Library, 1957), p. 107]. The Revised Statutes of British Columbia came out in 1877. This

was decades after the Council of Assiniboia codified the ordinances of the jurisdiction in 1832. For details of the latter development, see Brown, "Criminal Law Before 1886."

CHAPTER VIII

After Confederation, two of the prime tasks facing Sir John A. Macdonald were to cement the union by demonstrating that his government could legislate effectively for the new jurisdiction and to engender a sense of national unity among its people by giving them a common criminal law. To accomplish these tasks, he vested himself with the authority to deal directly with the problems involved by assuming the combined portfolio of Minister of Justice and Attorney General in addition to the Office of Prime Minister. After the prorogation of the first session in which ninety-five bills were given royal assent, it was evident that the first requirement had been met. With the second there were problems. Each of the contracting jurisdictions had a code of statute criminal law, but they were by no means the same in style, content, or punishments. There were a number of options open to the Prime Minister. He could attempt to adopt any one of these codes. This would be a fast and cheap solution. but if he attempted it, he ran the risk of the legislation getting bogged down in controversial and impassioned debate. A more equitable and practicable solution would be to issue a commission to assimilate all the provincial legislation into a federal code, a process he contemplated but rejected on the grounds of its expense, although a more compelling reason, which he left unstated, was that it would be a very lengthy process if properly executed and time was of the essence.[1]

A third option would be to follow the advice of Judge Gowan and pursue a middle course. He could adopt Greaves's Criminal Consolidation Acts, suitably amended, as the substantive Dominion penal law and assimilate the essentially similar procedural law which had been developed by the former colonies.[2] This was the option he chose. It was both ready-made and cheap, and Parliament would find difficulty in criticizing the product of Westminster. For political reasons, and these were perhaps the most compelling, it would avoid comparing the merits of the various colonial codes. As an added bonus, the Dominion "would thereby enjoy the inestimable advantage of having English decisions as authority in our courts," a benefit which was always a prime consideration with the Prime Minister.[3]

To put the legislation in shape, Macdonald employed his former subordinate from Ottawa, Gustavus Wicksteed, the Law Clerk of the Assembly, who had been translated to a similar appointment in the Dominion Government, and his private secretary, Hewitt Bernard. Work began in the second half of 1867, when they were also busy with a variety of other important measures.[4] Hence, they did not have much time for recasting Greaves's Acts if, as was likely, the Prime Minister intended to introduce the legislation during the first session of Parliament. Nor did they have authority to make any significant changes in the style or to effect any substantial compression, since Macdonald had set strict guidelines for the work.[5] Thus their bills were, as Mr. Justice Taschereau said, "taken almost textually from . . . the Imperial Criminal Law Consolidation Acts of 1861,"[6] excepting the few additions from provincial statutes that were not included in the English Acts.[7] On the other hand, no effort was made to eliminate the offences in these enactments which were not in the colonial statutes. There were, understandably, many such crimes, such as killing pidgeons and stealing from oyster beds for, of course, Greaves's Acts were intended to regulate a much larger, urban and commercial population.

The first session of Parliament began in November, 1867, and recessed from December 21 to April 14. Early in the new year, the two draftsmen were feeling the pressure of recasting the five English Acts and the several colonial procedural statutes. Accordingly, Bernard wrote to Gowan, who, in the meantime, had been employing his drafting talent for the Liberal Government of John Sandfield Macdonald, advising him that Wicksteed and he would "avail ourselves of your offer [to] revise our work."[8] They did so and on April 1, eleven bills to assimilate the criminal law of the provinces were introduced in the Commons by John A. Macdonald and given first reading. Second reading was to have been one week later, but on that day, April 7, D'Arcy McGee was assassinated and the House adjourned for the following week. On May 6, three weeks after it reconvened, Macdonald

> moved the second reading of the Bill respecting offences relating to the coin. He said with reference to this and a number of Bills relating to the criminal law, that he would ask the House in a great measure to accept them on trust. They had been prepared with a great deal of care. He had also examined them carefully himself, they would be open to amendment in Committee; and in the Upper House, where he had asked the Postmaster-General to take charge of them, they would also be subjected to careful scrutiny.[9]

Hence, the legislation was nearly a month behind schedule. If it was to get to the Senate before prorogation on May 22, extraordinary measures would have to be taken. Such was the case. All the bills in the series were forthwith "read a second time, considered in committee, and ordered to be read a third time tomorrow."[10] This was short shrift for measures totalling over 230 pages of text, but they were, indeed, read a third time the next day, and passed. As in 1859, the parliamentary magician had pronounced the magic words and the legislation was through without any questions. However, it should be noted that the Commons was composed largely of members from the Canadas whose laws were not unlike the English in their formulation. In the Senate, where the maritime element was proportionately much larger, the magic did not work.[11]

In that chamber there was concern that, if it submitted to the Prime Minister's pressure in such cases, it would degenerate quickly into a mere rubber stamp for the Commons, especially in the closing days of a session, as was alleged to have been the case with the Legislative Council of Canada.[12] To formulate their protest, a Special Committee was formed under the chairmanship of the Government Leader, Senator Archibald Campbell, on March 30. Its Report, tabled on May 7, stated that it was

> impossible for this House to discharge the duties devolving upon them unless ample opportunity is given them for the discussion of all measures subject to their consideration, and in the absence of any other remedy they recommend the extreme measure of refusing to pass important Bills brought in close at the end of the session.[13]

Notwithstanding, the Criminal Law Bills were introduced by the same Senator Campbell on May 12, ten days before Parliament was due to be prorogued. He told the members that although the Senate would not have time to give the bills due consideration, they had been carefully drafted, were based on English Acts which had matured for years, and that the House would thus have to take them on trust. Further, he said that what some members perceived to be new offences were really not so. Finally, he asserted that:

> No matter what course we take we cannot legislate upon this subject from our own knowledge. In a matter involving so much study we must

> trust somebody else to prepare these bills, and it could not very well be undertaken by a committee of our own House.[14]

It was not the most politic speech Campbell ever made and, as we shall see, he learned a great deal from this experience. But it did him no good at that time. Senators split on party lines and the Opposition rolled over the Government. To begin with, Jonathan McCully, who had been a member of the Commission responsible for the Revised Statutes of Nova Scotia in 1851, made the point by implication that introducing penalties for killing pigeons in the urban areas of England or in Canadian cities, where domestic birds could be costly, made sense. It made no sense in country areas in which pigeons were a pest. Consequently, "Under a clause of this bill every man who touched one of those pigeons, which were a nuisance to the neighbourhood, would have brought down upon himself this penal law."[15] Debate went downhill from that point for the Government, and Senator Sanborn, a Quebec Liberal, finished it off with a strong speech in which he objected to the late appearance of the bills and declared himself strongly opposed to passing them in their current form. He suggested that they be revised after prorogation, printed, and distributed to legal and judicial bodies throughout the Dominion and then, in the light of comment and criticisms made, put together in an integrated code in a future session. If the bills went through as they were, he predicted, the Government would eventually be swamped with both public and private bills to amend the essentially English Acts. He then moved that the bills not be read a second time.[16] The motion was carried and that was the end of the Criminal Law Bills for 1868.

Governor-General Monck was incensed by the Senate's decision and said so privately to Macdonald and publicly in his prorogation speech.[17] This was reported gleefully to Gowan by Wicksteed, who opined that the Senators "may be wiser next session."[18] He also told the Judge that there would be plenty of time to work on the criminal legislation, the latest copies of which would be sent to Gowan for revision. During the recess, there was a steady flow of suggestions from legalists and laymen, some unsolicited and some in response to requests from the Department of Justice, a few of which were incorporated in the bills which the Prime Minister began to introduce early in the session of 1869.[19]

His tactics were different from those of the previous year. The legislation itself had been changed only slightly but, although the Commons had passed it without a murmur the previous year, he was more conciliatory this time, telling Members that "valuable suggestions had been received on the several subjects during the recess by the Government, and the alterations, which he hoped would be considered by the House as amendments, had been incorporated." The bills would be put through clause by clause, at which time he would point out what the current law was in England and in the provinces, so the members would be able to compare the enacted law with the Government's proposals. Although the "language used in such measures in the Lower Provinces might be shorter and more concise" he had chosen

> to adhere to that before the House . . . [so] that the body of the Criminal Law should be such that the Judges in the Superior Courts should have an opportunity of adjudicating upon it, as on English law. It would be of incalculable advantage that every decision of the Imperial Courts at Westminster should be law in the Dominion. On every principle of convenience and conformity of decision with that of England, he thought it well to retain the English phraseology.[20]

Amendments were proposed and passed or failed according to the temper of the House and Macdonald even deferred debate when it was found that a member of the Opposition who had proposed to move an amendment was reported to be absent from the House.[21] It was, in short, a very different performance from the previous year's.

In the Senate, Campbell emulated Sir John's conciliatory performance. He had more need to do so, for the resentment of the Senators at the Governor-General's rebuke transcended party lines and they made no secret of their displeasure.[22] However, the change in the Government's attitude and the fact that the bills began to arrive in the Upper House early in May, changed the mood of the members, and while McCully and Sanborn extolled the virtues of the concise maritime codes and dilated on the verbosity and redundancy of the English Acts, they did so without rancour. Debate proceeded in a co-operative manner, compromises were made, and amendments were won and lost by both sides of the House. Well before prorogation, the Criminal Law Consolidation Bills had received third reading in the Senate and were given royal assent on June 22.[23] These Statutes, together with other penal enactments of the first and second session, totalled thirty-one Acts covering 364 pages.[24]

What you gain on the swings you lose on the roundabouts, runs an old adage, and it was certainly true of the decision to adopt Greaves's Acts as substantive Canadian criminal law. Since rapid resolution of the problem was a matter of the highest national priority, the decision was right because it exerted a unifying influence on the new jurisdiction; and it was right because it was politically expedient to avoid invidious comparisons of former colonial penal codes. But it was wrong in that the English laws brought in much that had never been law in any colony and, having been enacted for a unitary state, they contained provisions which were ultra vires of the Dominion Parliament.[25] They were also regressive. They brought back the style of the past. For example, the section on riotous damage to buildings was four words longer than the similar section from Greaves's Acts quoted above (p. 141) and, at 280 words, well over one hundred words longer than any similar section in any pre-Confederation colonial code.[26] In all of the five statutes the symmetry of long, one-sentence sections is relieved only once by the inclusion of the section on kidnapping, which had been formulated by the Dominion draftsmen who had employed the Canadian style of short, concise phrases and numbered sub-sections.[27] Furthermore, the English Acts brought back the mixture of substantive and procedural matter which all the provinces had corrected to a greater or lesser degree in the codifications of the 1850s. The Larceny Act, for example, had 124 sections and ran to thirty-five pages. Of these, forty-five sections totalling eight pages were devoted to procedure.[28] But nowhere in this mass of words was it made clear what "larceny" meant.

As far back as the early fourteenth century the word had been defined as

> the treacherous taking of a corporeal moveable thing of another against the will of him to whom it belongs, by evil acquisition of possession or of the use.[29]

This is a perfectly understandable and succinct definition and it is clear that larceny comprehends the modern crimes of theft, robbery, and other cognate offences. In contrast, as Fitzjames Stephen pointed out:

> The arrangement of the [Larceny] act is so strange that a person who, with no previous knowledge of the subject, attempted to find out from it what was the English law relating to the punishment of theft, and other similar offences, would be simply bewildered.[30]

Mr. Justice Cave was more succinct and colourful: "Our law on the subject is a thing of shreds and patches."[31] Hence, it is obvious that an individual who wished to read the Larceny Act with any degree of comprehension had to know and understand the common law pertaining to the subject. To give some idea of what this involved, it is instructive to learn that Stephen thought it necessary to devote two chapters of his Digest to lay the foundation for "a knowledge of the doctrines [the Larceny Act] presupposes" before attempting to define theft.[32]

Samuel R. Clarke did not take this trouble. He was a young Toronto lawyer who was called to the bar in 1870. His Treatise on the Criminal Law Applicable to the Dominion of Canada, published in 1872, was dedicated to the Prime Minister for his work in assimilating the criminal laws of the colonies. But without the foundation which Stephen had laid, Clarke's "definition" of larceny, which is really two separate and different descriptions of the offence, is confusing and of little help to the lay reader.[33] Indeed, the thought is inescapable that, after reading these passages the first question any intelligent person accused of larceny would ask, is: "Which version of larceny am I to be charged with?" So, too, with felony: the elaboration of this term takes up three pages and is supported by citations from fifteen judgements. For the analogous elaboration of "misdemeanour" the reader is referred to two pages of Russell on Crimes.[34] On the other hand, there is no mention of treason or sedition in the text or in the index--odd omissions for a volume purporting to give a comprehensive coverage of crime. In truth, and notwithstanding its frequent citation of Canadian cases, if any book was worthy of being nominated as the best advertisement for the need to systematize and simplify Canadian criminal law, Clarke's was it.

In the summer of 1870, a year after the passage of the Criminal Law Bills in Ottawa, R.S. Wright received his Commission from the Colonial Office to draft a criminal code for Jamaica.[35] At the same time, Judge and Mrs. Gowan left for Europe on the first long leave he had been able to take since his appointment to the bench twenty-seven years before. The Gowans were absent for nearly a year during which time they met most of the senior men in the legal hierarchy of England and Ireland and in the Colonial Office. Among them were Lord Thring, the Parliamentary Draftsman who introduced the relatively concise and economical style of the modern British statute and who gave Gowan a copy of his Instructions to Draftsmen; Lord Cairns, between appointments as Lord Chancellor; Lord Dufferin, soon to be Governor General of Canada, and Lord Carnarvon, a former and future Colonial Secretary.[36] Lesser lights of the latter department with whom he dined included Robert Herbert, Permanent Under Secretary, and Sir Henry Taylor, the originator of the colonial criminal code project, who presented Gowan with copies of his paper on the subject.[37]

Learning that they had a mutual interest in codification and that the Judge was an expert legislative draftsman, one of these men introduced him to R.S. Wright, probably in the early summer of 1871.[38] By this time, Wright claimed to have made considerable progress with his code, so that he and Gowan had much to discuss during the "long talk [they] had about codification and the Criminal Law" in Wright's chambers.[39] It may also have been Wright, who was collecting relevant documents for his enterprise, who introduced Gowan to Mrs. Livingstone

Barton. She was the daughter of Edward Livingstone, the Louisiana codifier, and at that time (i.e. 1871) she was in Europe seeing her father's works through the printer in both French and English editions. From her letter to Gowan offering him a copy of the French edition, it is evident that they had discussed her father's work during their meetings.[40] Thus, when Gowan embarked for Canada he had much first-hand information regarding codification and much news for Sir John A. Macdonald.

When Gowan arrived in Quebec in July 1871, Senator Sanborn's prediction was coming true. By then it was clearly evident that the criminal law of the Dominion was something more than the sum of the penal enactments of the former colonies and some borrowed English statutes; cracks in the 1868-69 legislation were being papered over with "Acts to amend Acts." In the sessions of 1870 and 1871 twelve penal statutes were passed: six were amending acts. The proliferation continued under Macdonald and into the Mackenzie administration, by which time "An Act to further amend an Act" had made its appearance, and fourteen more amending statutes were in force by 1874. The penal laws now covered 445 pages as opposed to 369 in 1869.

For once, such figures were not culled from a laborious search through the annual volumes of statutes, but rather from a handy reference book. In 1874, the Department of Justice put together a volume of the criminal statutes enacted since Confederation. It was in no sense a consolidation or code. But it must have been a godsend to magistrates and practitioners, for although it merely reprinted the acts by regnal year, in chrononlogical order, it had a table of contents consisting of the chapter numbers and titles of the acts, a reasonably comprehensive index, and continuous pagination.[41]

That year also saw the appearance of a much more sophisticated aid to the profession in the form of the first volume of The Criminal Law Consolidation and Amendment Acts, written by Mr. Justice Henri Elzéar Taschereau, a young and able member of the Quebec Superior Court.[42] Although it was a conventional treatment for the time and not unlike Greaves's similar volume of 1862--an annotation of the statutes it reproduced--it was much easier to read and understand than the average law text, for the Judge was a gifted writer with a clear, logical and uncomplicated style. It would, however, be considered unhandy today, because it contained only citations to English decisions. But it should be remembered that Greaves's Acts had been in force in England since 1861, and there was, consequently, a large number of these which, moreover, were binding on Canadian courts. On the other hand, the Supreme Court of Canada had not been formed at that date and judgements given in one province were not binding on another. Furthermore, as Taschereau pointed out, there was a thorough discussion of Canadian cases in S.R. Clarke's Treatis, and to repeat it would have been "superfluous."[43]

Late that year or early in 1875 Taschereau sent Greaves a copy of his work in which he had quoted the English lawyer extensively.[44] On February 18, 1875, Greaves answered in the first extant letter in the extensive Taschereau-Greaves correspondence, which continued for several years and possibly until Greaves died in 1881.[45] The Judge derived considerable benefit from this exchange, which he acknowledged in the "Preface" to his second volume. This treatise was a treatment of criminal procedural law and came out in November, 1875.[46] Unlike

Greaves who would have had to contend with several procedure statutes and many amending measures enacted over a period of forty years if he had wished to issue a similar work, Taschereau was able to produce a clear and coherent annotation, because the relevant law of the pre-Confederation colonies had been assimilated in four comprehensive statutes in the 1869 consolidations.[47] A reflection of this fact can be seen in the annotations: copious reference is made to Canadian decisions.

Meanwhile, in 1874 the Ontario Government determined to issue a revised edition of the Consolidated Statutes of Upper Canada. A commission was formed which Oliver Mowat invited Judge Gowan to join in February, 1876.[48] He accepted and from the ensuing correspondence, it is evident that a close relationship developed between the two men.[49] The Revised Statutes of Ontario, which came into effect in 1878 comprised two elegant volumes. The technical apparatus of titles and sub-titles was similar but somehat more detailed than that of the Consolidated Statutes of 1859 and the system of chapter headnotes had been borrowed from the maritime codes. It is also evident that efforts had been made to make the work more clear and concise than its predecessor. In part this may have been due to Gowan, who had not only the Canadian models before him, but also Wright's draft code. The English barrister, who had been influenced by the tightly written Norddeutsches Strafgesetzbuch, had completed the work in January of 1874, and Gowan had been sent a copy "for observation,"[50] probably about the same time Fitzjames Stephen agreed to review and revise it later that year.[51] Similar activity was going on in Nova Scotia and New Brunswick, where revised statutes were promulgated in 1873 and 1877 respectively.

This activity and the obscurity which the many amending Acts were bringing to the Dominion statutes, was no doubt the primary reason why the Mackenzie administration determined to consolidate and codify the federal enactments. In 1877 Edward Blake, the Minister of Justice, moved that $8000.00 be appropriated "to meet the estimated expenses in connection with the consolidation of the Laws."[52] He explained that the work would begin with the collection and collation of all relevant statutes, provincial and federal, and two of the junior commissioners who had worked on the Ontario revision would be employed for this laborious task.[53] However, he did not see the work through to completion, for after the session he resigned his portfolio on June 7 to take up the less demanding duties of President of the Privy Council. On June 23, perhaps motivated by the item in the estimates, Gowan raised the question of codification of the criminal law with Blake and offered to lend him Wright's code.[54] Blake replied:

> I have for sometime been anxious to see the criminal law placed on a better footing, and had I remained in my late office I would have made an effort to combine to some extent codification with consolidation. But the causes which led me to leave the office finished my attempts to try to deal with the subject at present, and therefore I do not think I can usefully avail myself of your kind offer to lend me the draft in your possession.[55]

Martin L. Friedland, the legal historian who rescued Wright and his Code from oblivion, demonstrates effectively that the latter is "in many, if not most, respects . . . a much better Code than either James Fitzjames Stephen's Draft Code of 1878 or the Royal Commissioners Draft Code of 1879."[56] Hence, at a time when the Mackenzie government had both the intent to systematize the criminal law and a blueprint for a better code than was to be enacted fifteen years later, the initiative failed because Blake did not have the will to push it through to completion. The incident remains, however, a fascinating "might have been" in Canadian history.

After completing work on the Ontario revision late in November, 1877, for which he received a gold medal struck for the occasion, Judge Gowan and his wife left for England on another long vacation.[57] They toured on the Continent during the cold winter months and returned to England in the early summer. The Judge was thus in London during the time when Stephen's Draft Code was introduced, debated, and withdrawn, and must have followed the debate and Stephen's interjections in the Times with no little interest. Gowan himself had something to add to the discussion. He had taken copies of the Revised Statutes of Ontario to England and it was at this time that he gave or sent them to several of his highly placed friends in the Colonial Office and the judiciary, among them Lords Carnarvon and Cairns.[58] Since the Lord Chancellor was, ultimately, the moving force behind codification in England at this time, Cairns's comments on the Canadian work are worthy of note. After remarking that he was "examining them with the most lively interest" because of their relevance to the current effort to "reduce our vast body of Statutes and Common Law," he said: "It is most interesting to me to observe how far you have gone in advance of us in Ontario in this most exemplary work."[59] High praise indeed from the head of the English legal system.

While Gowan was away, a feeble effort was made to move Blake's consolidation project forward. After his work on the Ontario revision was complete, Thomas Langton, a future law partner of Oliver Mowat, was hired to prepare schedules "of the Acts which are to be considered preparatory to the consolidation and revision of the Dominion Statutes."[60] To keep the project alive, Blake's successor, Rodolphe Laflamme, secured a second appropriation of $8000.00. But after the general election of 1878 swept Sir John A. Macdonald back into power, the initiative was allowed to peter out under the lacklustre administration of the new Minister of Justice, James MacDonald of Nova Scotia.

MacDonald's appointment had been brought about by a change in the Prime Minister's priorities. The authority of the Dominion Parliament had been established, and the standardized criminal law administered in all Canadian courts had extended its unifying effect on the provinces. Now the principal goal was to bind together the whole of British North America by implementing his National Policy, prime elements of which were to people the North West and to link British Columbia to the rest of Canada by rail. For this reason the Prime Minister also assumed the duties of Minister of the Interior. He gave the downgraded Justice portfolio to MacDonald, one of his less able colleagues, but a man who had rendered signal service defending the Government in the dark days of the Pacific Scandal, and who was, more importantly, the most prominent and influential Conservative in Nova Scotia after Charles Tupper.[61]

This appointment did not sit well with Gowan who, after his return from England, had discussed the matter with the Prime Minister.[62] He regretted that Sir John had not again assumed the duties of Minister of Justice, because he felt "more at home laying before you any matter that occurs [to me] on the subject I feel most interested in," whereas "I may be too far from the sea to meet the taste of your new minister."[63] Then, after bringing Macdonald up to date on the progress of codification in England as reported by Lord Cairns, he suggested that like measures be introduced in the Canadian Parliament. Wicksteed and he could work up the legislation and if it were done promptly, he saw no reason why "we should not anticipate the legislation in England."

Gowan was not the only one who was following the events at Westminster with close attention. Considerable curiosity was also evinced by the Montreal Legal News in "the steps taken in England toward codification," and several pages were devoted to an analysis of the proposed legislation.[64] The Opposition was curious, too. In the 1879 session Philippe Casgrain, a prominent Quebec City lawyer, was moved to ask the Minister of Justice if it was "the intention of the Government to codify the criminal laws, following the example set by England in that respect."[65] He was answered by an unequivocal "no" from James MacDonald. Later in the session, after the Commissioners' Bill had been introduced in the Imperial Parliament, Gowan returned to the theme in a letter to the Prime Minister, in which his disappointment with the Justice Minister's reply is evident: "I am sorry to see that your friend does not propose to do anything in the way of codifying the criminal law."[66] He went on to reiterate his argument for a Canadian code and reminded Sir John that Canadian legislation had frequently been in advance of similar measures in England.[67] A more immediate reason was advanced by Alfred F. Savary, the County Court Judge from Digby, Nova Scotia, who pointed out that twelve years had elapsed since Confederation and that consolidation of the mass of laws enacted during that period had "obviously become a necessity."[68]

In the Senate both the layout and the form of the Statutes came under attack from both sides of the House. Senator Lawrence Power, a

Liberal from Halifax who had worked on the Commission which had produced the fourth edition of the Revised Statutes of Nova Scotia, argued that the Dominion Statutes should be framed on the maritime model; that regnal years should be eliminated, that headnotes should summarize each chapter, and that a table of contents should be placed at the beginning of each sessional volume.[69] His Conservative colleague from Amherst, Senator Dickey, implied that these were cosmetic changes: the "root of the evil" was in "the phraseology and verbiage of our Statutes."[70] Others intervened to support these arguments in what was obviously a non-partisan debate. The only exception was the Government leader, Senator Campbell. In a tactful and graceful speech, he agreed with Power that the regnal years should go, but he made the best of Dickey's implication that change for the sake of change in the location of tables and indexes was undesirable. When he dealt with the question of the form and style used in drafting bills, he again advanced the argument that would appeal to the many lawyers in the Chamber.

> The law may be more tersely expressed in Nova Scotia than in our Statutes, but the reason why we use the form which we follow is that it is the language used in the English Statutes, and that gives us the advantage of having the interpretation placed by the English Courts upon the laws of that country, worded in the same manner as ours are. Few things could be more valuable in interpreting the Statutes, than to have the opinions of eminent men who are constantly dealing with the same subjects which are likely to come before our judiciary here.[71]

In closing, he told Senator Power that he would "draw the attention of the Minister of Justice to the question put by my Hon. Friend, and take care to impress upon him the views expressed in this House."[72] It was a skilful performance and one which demonstrated why Campbell had been the Conservative leader in the Senate since Confederation. Of course, all of this activity was going on against a backdrop of events of fundamental and much greater importance in the development of the nation, and if it gave the Prime Minister food for thought, there is no mention of it in his correspondence.[73]

In many respects, 1880 was a repeat of 1879 so far as the penal law was concerned. A question was put in the House: did the Government intend to codify the criminal statutes during that session? Again, James MacDonald answered in the negative.[74] And again Gowan urged the Prime Minister to anticipate the Imperial legislation; to no avail.[75] But Gowan was not content to lobby Sir John alone, and sought to interest another acknowledged expert on criminal law in his endeavour--Mr. Justice Taschereau, who, in the meantime, had been promoted to the bench of the Supreme Court of Canada by the Mackenzie Government "two days before leaving office in 1878 and twenty days after its defeat at the polls."[76]

How Gowan came to correspond with Taschereau is not clear. It may have had something to do with Taschereau's volumes on the criminal law, or Gowan may have met Charles Greaves during his recent visit to London. In any event, the first extant piece of correspondence in the exchange is a letter from Taschereau to Gowan with which were enclosed the manuscripts Taschereau had received over the years from Greaves.[77] Gowan paraphrased these letters for his own records and returned them to Taschereau with a letter of thanks. Precisely what was in the letter is not known, but since he wrote several drafts which have survived, and Taschereau's reply is in the Gowan Papers, a reasonable estimate of its content can be made. After thanking Taschereau for the loan of the letters and discussing briefly Greaves's achievements, Gowan got down to the topic which was of paramount importance to him. He suggested that

Greaves's work showed the "necessity for some clear authoritative definitions of the law by act of Parliament & why not in a code," and he urged Taschereau to take up the challenge of reformulating the law:

> I would that you could be induced to prepare a consolidation of the crim law or of some part of it or better still that the govmt. would give us a code and that you could be induced to take charge of a commission to prepare it for the legislature. (You are one of the few men in the Dominion who have proved yourself equal to such a . . . .)[78]

To assist him in this good work, Gowan enclosed a copy of Sir Henry Taylor's paper on codification in the colonies, and promised to send Wright's draft criminal code, which he had mislaid, when it came to hand.[79]

Taschereau's answer is interesting. In view of the circumstances of his appointment, he was obviously not a favourite of the Government and probably for this reason he did not comment directly on Gowan's suggestion. But it seems clear that he would not have been displeased if Gowan had taken the matter further:

> I entirely concur in all that you say about the necessity of a Criminal Code for our Dominion. Sir John it seems to me has only to give his fiat and we would have one. I have reason to believe that he entertains the highest opinion of you and it may be that you could induce him to render this great service to our country, and thus add to the numerous services for which Canada will always hold him as one of her noblest sons.[80]

This letter terminates the correspondence and, evidently, Gowan's initiative. While he continued to press the Prime Minister to codify the criminal law, he did not mention Taschereau, nor is there any evidence that Taschereau raised the issue with Sir John at that time.

But the need for some sort of reform was just as evident to the Prime Minister as it was to Gowan. Between [illegible] and 1880, fifty additional penal laws had been enacted, of which seven were amending acts, and 115 pages had been added to the book of criminal statutes.[81] The time was not far off when this work would need to be issued in two volumes, for it contained well over five hundred pages after the session of 1880.

At this point in his mandate, Sir John A. Macdonald could pause and catch his breath. Times were good: economic recovery was well advanced. He had won a diplomatic round with the Colonial Office and now had a High Commissioner seated in England, and offers were being made to build the railroad.[82] But he cannot have been pleased with the performance of his Minister of Justice whose correspondence with the Prime Minister is silent on the duties of his office and wholly concerned with questions of patronage.[83] At least that is an inference that can be drawn from the fact that when remedial action was taken, it was the Prime Minister personally who took the initiative.

Sometime later in the fall of 1880, he decided to take action. He would not go as far as Gowan urged, but would rather follow the route mapped out by Cairns--consolidation of all the public statute law, and then, possibly, codification of the criminal law. Accordingly, he earmarked $5,000.00 in the estimates for 1881 to begin the work of consolidation.[84] When the item was questioned by Edward Blake on March 10, it was the Prime Minister who answered him. He said that the Government would follow the example of Ontario "and that my good friend Judge Gowan might have to be brought down to keep a watchful eye on the work."[85] No commissioners had been selected, he continued, and no plans had been made: "The Minister of Justice will apply himself to that subject after prorogation."[86] But plans had been made and Sir John began to implement them shortly afterward. On March 30 he sent a formal letter to an old friend, James Cockburn, asking him to begin the preliminary work of consolidation.[87]

Cockburn, a Father of Confederation, a lawyer, and a staunch supporter of the Prime Minister, had fallen on hard times since the days when he had been the first Speaker in the Dominion Parliament, and had been seriously ill since 1878. In fact, according to his biographer, he was destitute, apart from his sessional allowance as a Member of Parliament.[88] All this is reflected in the personal and private letter Sir John sent to Cockburn with the formal invitation, in which he made the point that when a Commission was issued "the fact of your having worked will entitle you to be paid from the time that you commenced your labours, say from the 1st April."[89] Furthermore, the work could be done in Cockburn's home. In the meantime, the Prime Minister laid his plan before the Cabinet: the schedules begun by Langton should be completed prior to the appointment of a Commission to revise finally and consolidate the statutes and the "Minister of Justice [should] be authorized to employ such assistance as may be necessary for proceeding with the work."[90] At the same time, he secured $1000.00 from the $5000.00 vote which was doled out to Cockburn in instalments as "disbursements re consolidation of Dominion Statutes."[91]

At this point it looked as if, once again, Macdonald and Gowan would provide the driving force behind the work. But providence intervened. On April 7, the Minister of Justice informed the Prime Minister that Chief Justice Young of Nova Scotia, who had been ill for some months past, had decided to retire.[92] He did so effective May 4. The Prime

Minister now had the perfect opportunity to get rid of a political liability in Ottawa and yet retain the good will of one of the most influential Nova Scotia Conservatives. He lost no time. James MacDonald was appointed Chief Justice of Nova Scotia effective May 20.

His replacement in the cabinet shuffle of that date was Senator Sir Alexander Campbell, perhaps the best man for the job whom Macdonald could have found from the talent then available in Parliament.[93] He took hold at once. For example, requests from Cockburn for material for the consolidation project which MacDonald had not even bothered to acknowledge were dealt with the day they were received after Campbell took over.[94] The Prime Minister also made a wise choice in the man who eventually became the Secretary of the Commission, Alexander Ferguson, an Ottawa lawyer, for he, like Cockburn, was a diligent worker. Their task was not an easy one.

They began by reviewing and extending Langton's work in preparation for the main task, which began officially on November 15. On that day, Cockburn resigned his seat in Parliament on the grounds of ill health. He was simultaneously appointed Commissioner at a salary of $4000.00 per annum, from which was deducted the several disbursements made to him in the previous months.[95] By the terms of his Commission he was enjoined to review all the statutes of the former colonies, now jurisdictions within the Dominion, and to "collect therefrom all the unrepealed enactments as relate to matters now within the exclusive legislative authority of . . . Parliament"; to review all Dominion Statutes enacted since 1867 and collect all Acts still in force; to classify this mass of material according to subject, consolidate it, and recommend what part of it should be repealed, continued in force, or otherwise disposed of.[96] During this labour, the Commissioner examined several thousand enactments. He recommended that 1294[97] be repealed, he completed nine books of schedules and filled thirteen volumes containing upwards of 350 pages each with the statutes he had consolidated.[98] For all of these elaborate indexes were prepared. All of the work was in longhand: there were no typewriters.

In addition to the tasks specified in the Commission, Campbell later issued supplementary instructions that Cockburn was to concentrate on the collection of statutes pertaining to the criminal law and to consolidate them in a bill to be introduced in Parliament in the session of 1883.[99] Campbell did not intend to press for its passage at that time, but he wanted a statement of intent which would allow members to see what was in prospect and to comment on its substance. Relevant comments and proposals could then be integrated into a subsequent bill which could then be passed expeditiously.[100] After a good deal of effort was expended in this initiative, the scheme was abandoned in favour of a more ambitious proposal developed by George Wheelock Burbidge, the new Deputy Minister of Justice.

Considering the swamp of patronage in which senior governmental appointments were usually mired during the nineteenth century, the story of Burbidge's appointment is refreshing. Born in 1847, he was a superior student and graduated from Mount Allison with a B.A. in 1867. After teaching school for two years, he returned and took his M.A. in 1870. Shifting to the law, he was called to the New Brunswick Bar in 1872. He soon became one of its leaders, a partner in a St. John law firm, and a supporter of the Conservative Party. In addition he was the Secretary of the Commission which drafted the 1877 edition of the Revised Statutes of New Brunswick; concurrently, he prepared an index of the statutes in force as of 1878, and he was the Law Reporter of the New Brunswick Reports from 1877 to 1882.[101] When, in the spring of 1882, Zebulon Lash, the Deputy Minister of Justice who had been so appointed by Edward Blake in 1876, gave notice of his resignation, Campbell evidently asked him to recommend his own replacement. Lash told him that "Burbidge is an unusually sound man."[102] In a letter to the Prime Minister, Campbell listed Burbidge's qualifications for the job. Significantly, the first item was that "he was employed on the revision of the New B[runswick] Statutes." After detailing several cases which Burbidge had litigated successfully for the Crown, he concluded:

> Lash knows well what are the qualifications most necessary and has seen Burbidge a good deal and recommends him in preference to [Connally] for general good sense--facility with business and [readiness] of dealing with men--he thinks his knowledge of law quite equal to [Connally's].[103]

The emphasis is all on the individual and his professional qualifications; there is no mention of politics or patronage, or the region of the Dominion which he represents. Burbidge was appointed Deputy Minister of Justice on May 23, 1882.

It became apparent almost immediately that Cockburn and Burbidge viewed the content and purpose of the consolidation from different perspectives. Cockburn had been instructed to digest the written law and had done just that and no more; there is no evidence to suggest that he saw the consolidation as an instrument of change. On the other hand, as soon as Burbidge was appointed he began to send Cockburn the considerable volume of correspondence from the legal profession and the public at large advocating amendments to the law which had originally been directed to the Department of Justice.[104] Obviously he thought that amendments should be incorporated in the consolidation.

But it was the Minister of Justice, not Burbidge, whom Cockburn had to satisfy. He evidently did so because the following September, after "a complete examination" of his work, Campbell informed the Prime Minister that the point had been reached where the detail of the consolidation should be finalized and a bill prepared to give it effect. There were two alternatives by which this could be accomplished: Cockburn and Ferguson could prepare the draft, after which additional commissioners from Quebec and the maritimes could be appointed to review and polish the work, or they could be appointed immediately to assist in the preparation of the draft. Campbell suggested that the former plan would be the better and more economical course of action.[105] Macdonald agreed and instructions were issued to that effect.[106]

Cockburn and Ferguson bent to the task but it was slow going. Consequently, no legislation was ready to be introduced in the session of 1883. Questions were asked in the Commons and, as a result, Edward Blake was able to unravel the tangled skein of Cockburn's appointment.[107] Toward the end of the session it was evident that the draft would soon be ready to be examined by a full Commission. Campbell therefore moved to procure a supplementary estimate to cover the anticipated expenditure and began to formulate a plan to get the job done.[108] As it fell out, Burbidge was to be a Commissioner and Cockburn and he were to be responsible for the consolidation of the criminal statutes.[109] He began to prepare for his task well before the issue of the Commission by purchasing the latest edition of Archbold's Criminal Procedure.[110] But after a few days with this 1500 page volume of undigested material, he decided to provide an alternative to the analogous mass of undigested information which a conventional Dominion consolidation would provide: that is, he would produce an unexpurgated consolidation of the statute law as directed by the Minister and, apparently working on his own, he would also draft a code of combined common and statute law, modelled on Fitzjames Stephen's work.

To this end Burbidge wrote to a colleague, John Courtney, the Deputy Minister of Finance, whose brother was the Secretary of the Treasury in Britain:

> You are aware that there is in course of preparation a consolidation of the Statutes of the Dominion which will include the Criminal Law.
>
> In connection with the preparation of the latter branch of the work it is desirable that consideration should be given to the reforms during the late years made and suggested in England for which purpose I will need to obtain:
>
> 1 Six copies of the Criminal Code as prepared by Sir James Fitzjames Stephens [sic].
> 2 Two copies of the report made thereon by Lord Blackburn, Mr. Justice Barrie, Lord Justice Lush and himself.
> 3 Six copies of each of the bills relating to the Criminal law or judicature introduced into the Commons at the present or late session of Parliament.
> 4 Any further information which your correspondent being on the spot may judge to be of assistance for the purpose indicated.
>
> Would you do me the great favour of forwarding this letter to some friend of yours in London who would for your sake oblige me, and request him to have the kindness to procure what is wanted.
>
> For any expense your friend is put to I will gladly reimburse him.[111]

The old-boy network functioned smoothly and on August 9, Burbidge gratefully acknowledged receipt of a bulky crate of documents which had been shipped to him via the Canadian High Commissioner in London.[112] After perusing this material, Burbidge realized that since Stephen was the author of the Draft Code, he would derive additional information from Stephen's Digest of the Criminal Law. For this reason he personally ordered a copy of the 1877 edition from Carswell Publishers on September 15.[113]

In the meantime, Macdonald had issued the Commission, five Commissioners including Burbidge and Cockburn had been appointed, and Campbell, Chairman *ex officio*, had divided the work among the members and decreed that it was to be done on the premises of the Department of Justice.[114] Each of the five was made responsible for the revision of a specific block of statutes. Collectively, they were responsible for the accuracy of the work as a whole, which task they accomplished by jointly revising each section of the work completed by a member during 256 meetings of the Commission, each of which lasted upwards of five hours.[115] Presumably, these were chaired by Burbidge, since Campbell did not take part in the day-to-day work, and when Cockburn died on August 14, Burbidge was left as *de facto* Chairman of the Commission and principal adviser to the Minister.

By the following spring, sixty-two non-criminal chapters of the consolidation were complete. Burbidge had also drafted a code of indictable offences which he prevailed on Campbell to accept as a sixty-third chapter in place of the previously consolidated criminal statutes.[116] During the session of 1884, the Minister tabled this material in the Senate as a progress report.[117] He made it clear that the Government had no intention of attempting to enact any of the material, 2000 copies of which were distributed not only to Members of Parliament, but also to bench, bar and leading members of the public. Rather, his objectives were to show what had been done and to provide something tangible to read and analyse and so generate discussion during the recess. This, he hoped, would generate constructive criticism which could be incorporated into "a further and more accurate revision, and probably an approved one."[118] However, he also made it clear that while several advantages would accrue if a suitably amended version of Burbidge's draft code were enacted,

> It will be for Parliament, of course, to decide hereafter how far it is desirable to adopt that code, or how far it is desirable to fall back on a simple consolidation of our own statutes.[119]

Parliament was prorogued shortly thereafter. Summer came and passed into fall. Winter began. But neither the Minister nor the Justice Department received any comment on the Consolidation.[120] Nevertheless, Burbidge was able to report in December that the work was complete in a draft of 185 chapters and several schedules which filled over 2600 pages, and that a comprehensive Report was in preparation.[121] Campbell then began to think about the tactics whereby the legislation could be enacted. Since he was in the Upper House, the most convenient and expeditious plan would have been to introduce it in the Senate where he would have been able to steer it through the first Parliamentary rapids. But this would have raised complex constitutional issues concerning the right of the Senate to initiate such legislation.[122] Moreover, in the absence of any comment on the material previously distributed, which probably implied that few, if any, had read it, would Parliament baulk at enacting this massive measure in one session?

For help he turned to John Bourinot, Chief Clerk of the Commons, and already an acknowledged expert on constitutional law.[123] In an exhaustive discussion of the subject, Bourinot concluded that the Senate did have the legal right to deal with the matter in the first instance. But he did not recommend that it do so. Instead, he advised that Parliament should follow English precedents which would not awaken or engender opposition unnecessarily: a select committee of both Houses should be formed to review and revise the consolidation, under the chairmanship of the Minister of Justice, and to draft a bill to give it effect. This measure would then be introduced in the Commons.[124] Such a procedure would ensure that there would be wide-ranging discussion and publicity for the measure, with full opportunity for members of both Senate and Commons to make whatever changes were thought necessary, prior to the introduction of the enacting legislation. After this, consideration of the bill would likely be pro forma and the necessity for its consideration by a select committee of either House would be obviated. Bourinot's advice was taken. The Commissioners' Report and the volumes of the Consolidation were tabled in the Commons and Senate at the opening of Parliament in 1885.

But before further action was taken, it became clear that Campbell had had second thoughts about Burbidge's draft code. Senator Power, the Nova Scotia codifier and Opposition critic, asked if the Minister intended to proceed with a criminal codification bill as well as the Consolidation. Campbell thought not; perhaps in the next session, but maybe not then. His was a foggy answer, a placatory assurance that "What we are proposing in consolidating the statutes is to give the law as it stands" and a signal that he intended to take no chances.[125] He knew that Burbidge's draft included not only the many changes incorporated by Stephen, but also the relevant amendments proposed by Canadian commentators. Privately, he approved of it, but he also had to recognize political realities. However much he wanted a rational, systematic treatment of the criminal law, he did not want the inevitable controversy such a measure would create to jeopardize the work of the past several years. If he wanted to put through a massive revision of the statute law, he had to lay aside the criminal code for the time being.

On March 16, the Minister moved that the House of Commons be asked to unite with the Senate to form a Joint Committee to examine and report on the Consolidated Statutes, the first motion for such a Committee to be made in the Dominion Parliament.[126] He followed with a major speech which demonstrated his mastery of the subject and his ability to carry the House with him. It began with a complete review of the history of codification in the colonies before Confederation, including the names of the Commissioners and the details of their work. While he was obviously speaking from notes or a prepared script, a question came up which required an extemporaneous response. It was in this exchange that the Minister showed himself to the best advantage. It occurred when he passed over Prince Edward Island with the remark that there "has never been a consolidation there." Senator Howlan of that Province challenged this statement repeatedly. Campbell attempted to by-pass the obstruction diplomatically and to leave it behind, but he obviously became irritated by the continued interjections, so he gave the Senator chapter and verse on the several republications of the Island Statutes and concluded that "There was no consolidation in the sense that we mean."[127] Howlan finally agreed that this was true.

Campbell went on to describe the process whereby the Consolidation had been accomplished, and analysed several chapters of the work to illustrate the method which had been followed to achieve a great measure of concentration without introducing change. In the course of these remarks he gave graceful plaudits to the Commissioners, especially Burbidge, complimented Senator Power and the new member, Senator Gowan, on their past achievements in this field, expressed his desire for their assistance with the proposed legislation, and compared the financial outlay for the Dominion work favourably with that of Ontario in 1877. All in all, it was as well planned and effective a speech as any made on the subject in the pre-Confederation legislatures or in the Imperial Parliament.

Unfortunately for Campbell, all of his patient work on the Revised Statutes of Canada, as the Consolidation was to be titled, was negated for that year by a series of events which drew attention away from the routine work of Parliament. News of the clash at Duck Lake came in a few days after his speech, and for the rest of the session he and, to an even greater extent, Burbidge were engaged in the prosecution of Louis Riel and in other ramifications arising from the Rebellion.[128] At the same time the Prime Minister, who would pilot the Revised Statutes through the Commons, was even further distracted from Parliamentary routine by a major crisis which blew up over the financing of the Canadian Pacific Railway, and by the negotiations required to bring John Thompson, then a Justice of the Supreme Court of Nova Scotia, into his Cabinet.[129]

Nevertheless, the Joint Committee was convened and began its deliberations on March 27. A month later, Macdonald introduced Bill 130, "An Act Respecting the Revised Statutes of Canada" in the Commons, where it received first reading.[130] He probably made this move in the hope that there would be no obstacle to the speedy *pro forma* acceptance of the measure by the Joint Committee, but if so, his hopes were soon dashed. In the course of their protracted deliberations, the Committee recommended many detailed amendments, the enumeration of which covered six pages.[131] Macdonald knew what was going on in the Committee and he knew as well that the personnel who would normally deal with the matter were otherwise engaged. He also realized that even if the measure were pressed, it would get into Parliament very late in the session and he had no wish to repeat the experience of 1868. He, therefore, withdrew Bill 130 on June 9, notwithstanding Campbell's advice to press ahead with it.[132] In the event he was proved right, because the Committee Report was not tabled in the Commons until June 30, less than three weeks before prorogation.[133]

Immediately afterward, the really intense bargaining began to recruit Thompson into the Cabinet. Thompson was not eager to leave his congenial employment on the bench and go to Ottawa and would do so only if he were given the Justice portfolio. When it became clear to the Prime Minister that there was no possibility of compromise on this issue, he unceremoniously shuffled Campbell back to his old Ministry, the Post Office, and Thompson was installed as Minister of Justice on September 26.[134] There were, of course, initial drawbacks to this change. So far as the Revised Statutes were concerned, about which Thompson knew nothing, it meant more work for Macdonald. For years the Prime Minister had maintained only a watching brief on the process while Cockburn, Burbidge and Campbell had done the work. Now, with Campbell resentful and Burbidge in London for Riel's appeal, he was forced, briefly, to become involved in the minutiae of the work.[135]

With Parliament in recess and with this sort of assistance from the Prime Minister, Thompson was able to settle into his new job comfortably and to assume his new responsibilities quickly. By the beginning of 1886, he was fully in control of his Department and thus able to relieve Macdonald of his duties as spokesman for Justice in the Commons. However, it was one thing to be the chief executive of a department, but quite another to pilot a bill through a chamber of well over two hundred imperfectly disciplined and often disrespectful M.P.'s, as he quickly found out. In his maiden speech on March 3, a week after the session began, he moved first reading of Bill No. 9, an Act Respecting the Revised Statutes. He gave a very abbreviated version of Campbell's address in the Senate the previous year, and also stated that the Statutes of 1885 had been incorporated in the text, together with the amendments suggested by the Joint Committee.

In the course of his remarks he said:

> After the attention which the subject has received in both Houses last Session, I take it that the present Bill will be, in its progress through its chief stages, regarded as of a merely formal character; but at the same time it may be convenient for the House that I should make briefly such explanations as seem to be in point

> at this stage, rather than at the second reading of the Bill, in view of its probably formal disposition at that stage.[136]

It thus appears that the Minister assumed that the Revised Statutes would receive pro forma acceptance. He was quickly disabused of this notion by Edward Blake who pointed out that, apart from the twelve who had been members of the Joint Committee, no member of the Commons had had any opportunity to discuss the measure. Moreover, he wanted to know "exactly what alterations have been made in the volume."[137] Thompson recovered very quickly. He claimed to have been misunderstood and said, gracefully, that of course he would be "greatly gratified if the Bill received from the members of the House a great deal more than merely formal consideration."[138] Quick thinking and a willingness to compromise defused what could have become an acrimonious debate and the motion was agreed to without rancour.

However, this encounter seems not to have been sufficient warning to the Minister that the Opposition would not be pushed into doing something because he said it should be done. When he moved second reading a month later, Blake asked if it was "the intention of the Minister that this bill shall not be referred to a select committee?"[139] Thompson replied that

> It was [his] view that it need not be referred to a special committee this year inasmuch as it has already been before a committee, and that committee has reported and made suggestions which will be found running through the whole volume. I certainly thought that the House in Committee of the Whole would now be prepared to deal with the matter.[140]

Again, Blake rose to begin the process of changing Thompson's mind. He pointed out that the bill under consideration was not the same as that of the previous year; that many alterations had been made by the inclusion in the Revised Statutes of the enactments of 1885, to say nothing of those proposed by the Committee; that the Committee itself, of which he had been a member, had not been exhaustive in its examination and, finally, that "all the consolidations which have taken place in the old Province of Canada have never been passed through the House without being submitted to a select committee for revision."[141] Thompson attempted to defend his position. But what he said boiled down to an assertion that the members should have done their homework after the Bill had been introduced and should have come to the sitting

> . . . prepared to call attention to any defect which might have occurred in [the 1886] revision. If hon. members are not in a position to do so today, I will defer it to a later date, but it does not seem to me to be such a work as to require a select committee.[142]

Blake then elaborated the themes he had previously stated. He was followed by several more members of the Opposition who gave Thompson chapter and verse of the defects of the Joint Committee and of the work itself.[143]

When they were finished, it must have been as clear to Thompson as it is to a reader of the Debates that he was in for heavy weather if he persisted in his demand that the House go into Committee of the Whole. He wanted to put through legislation which ran to over 2600 pages. If the House took it up in a clause-by-clause examination in its present mood, there was little chance of getting it through that session, if ever. He therefore retreated and, as in his previous encounter, made a gracious speech in which he commended the members of the Joint Committee for the careful attention they had given the work, agreed with Blake's view of the situation, and promised to reconsider his position. Next day he moved that the Bill be sent to a select committee.[144]

From all of this it would seem that in his initial encounters with the House of Commons in the role of pilot of legislative vessels, Thompson could not predict where the rocks and shoals would be. But it is equally obvious that he was a phenomenally fast learner and that if he did run aground, he was able to manoeuver back into the deep water of progress rapidly and with the minimum of divisive argument. In this respect, it is instructive to compare Thompson with John Holker: the Minister had learned in a few weeks what it had taken the English Attorney General years to comprehend.

It was during this early learning period that Thompson first met Senator Gowan, who was then attending his second session of Parliament. Although the volume of Gowan's correspondence with the Prime Minister had not declined over the years, little was heard from him on the subject of codification after the appointment of Cockburn and Campbell in 1881. Evidently he was satisfied that events were now in train which would achieve much or all he desired in this respect, and that his urgings were no longer necessary. Moreover, he was away from Canada much of the time enjoying a well-earned rest after his forty years on the bench.[145] But after his appointment to the Senate in January 1885, he soon found himself back in harness. A month after taking his seat, he had been appointed to six committees, two of which he chaired, and two weeks later he was named a member of the Joint Committee on the Revised Statutes.[146] He was thus in a good position to advise Thompson on this matter after the Minister's Bill was introduced in the Senate.[147] In the event, his advice was unnecessary, for after the initial hiatus the Bill sailed briskly through the Commons and then passed the Senate without difficulty. The Revised Statutes received Royal assent on June 2 and, with the integration of the Acts of 1886 in the text, came into force on March 1, 1887.

Like its predecessors of the 1850s, the work was a remarkable achievement. With its enactment the legislative output of more than twenty-five years was repealed and replaced by two manageable volumes, which put the statute law of the Dominion in roughly the same condition as the analogous English law in 1877, after the final volumes of the English revision were published by Lord Chancellor Cairns's Law Reform Committee.[148] In particular, the enacted criminal law was concentrated between two covers and was thus in ideal form to be codified.[149] Thompson was certainly proud of the work, for he had a copy sent to David Dudley Field, the New York codifier for which he personally wrote the covering letter.[150]

But the collection was not perfect: it had the defects of its predecessors, and more. As Campbell had made clear in his Senate speeches, the law had not been altered in any major provision; it had merely been rearranged. No definitions had been supplied and no attempt had been made to integrate any of the common law. Furthermore, the Joint Committee had suggested that the chapters should be numbered consecutively, that the preamble and enacting formula be omitted from all but the first chapter, and that short chapter titles be substituted for the full titles of the draft.[151] That is to say, the revision should follow the format of the maritime codes, rather than the Consolidated Statutes of Canada. Thompson explained that the recommendation had not been followed in order to keep the Dominion format uniform with those of the majority of the provinces, whose revisions, he said, also followed the old Canadian model.[152] Thus, each chapter of the Revised Statutes is a separate and distinct Act, complete with preamble and words of enactment. And for reasons which were not explained, the critical apparatus of clearly defined topics marked off by titles and sub-titles, which was such a desirable feature of all the previous collections, was omitted altogether. As finally published, the Table of Contents consisted of a list of the titles of the chapters, each of which begins: "An Act respecting . . . ." Familiarity with the Consolidated Statutes of 1859 makes it clear that the 1886 work follows roughly the same order: constitutional matters, public departments, and so on. But this would not have been obvious to a beginner or to a layman, and in any case these divisions were beginning to lose their cohesion. The penal statutes, for example, which had formed the final part or title in all the codes of the 1850s, were now to be found in two locations in the Revised Statutes.[153]

Nevertheless, the statutory Dominion criminal law had been compressed into forty-nine chapters of the Revised Statutes. They replaced 152 Dominion Acts and several colonial statutes, and substituted 444 pages for over seven hundred. The core of the collection was still the Criminal Consolidation Acts of 1869, but they had been reworked in much the same way as the analogous chapters in the 1859 collection. To illustrate: the Larceny Act of 1869 contained 124 sections; the same title in 1886 was reduced to ninety-eight. The deleted material, twenty-six sections and parts of others, was transposed to procedural chapters. However, the sections which remained were almost verbatim transcripts of the originals; the section on riotous destruction of buildings, for example, was still an interminable sentence which ran on for 233 words.[154]

NOTES TO CHAPTER VIII

[1] Macdonald to Richard Snelling, February 29, 1868, Macdonald Papers, reel c 26. Snelling was a Toronto lawyer who had written to Macdonald concerning such a commission.

[2] Gowan to Macdonald, January 28, 1862, Macdonald Papers, reel c 1600. The suggestion of Gowan was made with respect to the assimilation of the criminal law of the two Canadas, but from the context of the letter and the plan which Macdonald followed, there is little doubt that it was this suggestion which Macdonald acted on in 1867.

[3] Macdonald to Gowan, October 12, 1871, Macdonald Papers, reel c 30. See also the Prime Minister's remarks in the debate on the criminal law bills in 1869. House of Commons, Debates, April 27, 1869, p. 89.

[4] Bernard to Gowan, March 3, 1868, Gowan Papers, reel m 1937.

[5] Wicksteed to Gowan, April 23, 1868, Gowan Papers, reel m 1938; Gowan to Thompson, April 21, 1892, Thompson Papers, reel c 9257.

[6] Taschereau, Consolidation Acts, I, iv.

[7] Bernard reported to Gowan that he had gone over the bills with Senator Jonathan McCully of Nova Scotia and John H. Gray, a New Brunswick M.P., to ensure that no items from those Provinces were missed. Bernard to Gowan, March 3 and May 30, 1868, Gowan Papers, reel m 1937.

[8] John Sandfield Macdonald to Sir John A. Macdonald, May 29, 1868, Macdonald Papers, reel c 1659; Bernard to Gowan, March 3, 1868, Gowan Papers, reel m 1937.

[9] House of Commons, Debates, May 6, 1868, p. 642.

[10] Ibid., p. 643.

[11] In the Commons the ratio of members from Ontario and Quebec to those from Nova Scotia and New Brunswick was nine to one: in the Senate it was two to one.

[12] Senate, Debates, June 4, 1869, p. 264.

[13] Ibid., p. 261. The full report is printed in Canada, Senate, Journal, May 7, 1868, pp. 260-61; hereafter cited as Senate, Journal.

[14] Senate, Debates, May 15, 1868, p. 320.

[15] Ibid., p. 321.

[16] Ibid., pp. 288, 321; May 16, pp. 325, 327.

[17] Monck to Macdonald, May 17, 1868, Macdonald Papers, reel c 1513; House of Commons, Debates, May 22, 1868, p. 763.

[18] Wicksteed to Gowan, May 23, 1868, Gowan Papers, reel m 1938.

[19] See, for example, Macdonald to John M. McMullen, the historian from Brockville, June 1, 1868, Macdonald Papers, reel c 26; Macdonald to William J. Richie, C.J.N.S., May 25, 1868, ibid.

[20] House of Commons, Debates, April 27, 1869, p. 89.

[21] Ibid., May 4, 1869, p. 171.

[22] Senate, Debates, June 4, 1869, pp. 262-77.

[23] The main debates on these bills in the Senate took place between June 1 and 7. Senate, Debates, 1869, pp. 246-87.

[24] Canada, Statutes, Acts of the Parliament of the Dominion of Canada Relating to Criminal Law (Ottawa: Queen's Printer, 1874).

[25] For details see Taschereau, Consolidation Acts, I, iv, et passim.

[26] 1869, 32&33 Vic., c. 22, s. 15 (Cda).

[27] Cf. 1861, 24&25 Vic., c. 100, s. 56 (Imp.), and 1869, 32&33 Vic., c. 20, s. 69 (Cda).

[28] See R.S.C., 1886, II, Appendix no. 2, p. 2447, which details the disposition of the forty-five sections to procedural chapters in that revision.

[29] Andrew Horne, The Mirror of Justices, ed. and trans. by William Whittaker (ca. 1290. London: Bernard Quaritch, 1895), p. 25.

[30] Stephen, HCL, III, 146.

[31] In re. Bellencontre [1891] 2 Q.B. 122 at 137.

[32] Stephen, Digest, p. 194, n. 1.

[33] Samuel R. Clarke, A Treatise on the Criminal Law as Applicable to the Dominion of Canada, 1st ed. (Toronto: Carswell, 1872) p. 289.

[34] Ibid., p. 79.

[35] Friedland, "Wright's Code," p. 307.

[36] Gowan to John A. Macdonald, October 12, 1870, May 15, 1871, Macdonald Papers, reel c 1600; Gowan to Thring, draft, July 25, 1892, Gowan Papers, reel m 1938. Henry Ardagh, Life of Hon. James R. Gowan (Toronto: University Press, 1911), p. 178.

[37] Friedland, "Wright's Code," p. 308; Gowan to Mr. Justice

Taschereau, Supreme Court of Canada, draft, April 17, 1880, Gowan Papers, reel m 1938.

[38] It was not 1872, as Friedland ("Wright's Code," p. 340, n. 282) was led to believe by Gowan's letter to Wright of January 19, 1891 (draft) in which he reminds him of their meeting "in 1872." Gowan Papers, reel m 1900.

[39] Friedland, "Wright's Code," p. 312; Gowan to Wright, draft, January 19, 1891, reel m 1900.

[40] See Barton to Gowan, fall, 1872, and Gowan to Barton, draft, April 9, 1873, Gowan Papers, reel m 1897.

[41] Canada, Statutes, *Criminal Law Acts 1874*.

[42] Henri Elzéar Taschereau (1838-1911), born Ste. Marie de la Beauce, L.C.; educ. Quebec Seminary; called to the bar 1857; appointed puisne judge, Superior Court of Quebec, 1871. In 1874 Taschereau was thirty-eight and had been on the bench of the Superior Court for four years. He was promoted to the Supreme Court of Canada on October 8, 1878 by the Mackenzie Government as one of its final appointments. He was elevated to Chief Justice by the Laurier Government in 1902.

[43] Taschereau, *Criminal Law Acts*, I, iv.

[44] Ibid., p. vi.

[45] The letter is reproduced in the "Preface" to Volume II of Taschereau's *Criminal Law Consolidation and Amendment Acts* (Toronto: Hunter, Rose & Co., 1875), p. iii.

[46] Loc. cit.

[47] 1869, 32&33 Vic., cc. 29, 30, 31 and 32 (Cda).

[48] Mowat to Gowan, February 5, 1876, Small and Gowan Papers.

[49] See the correspondence between the two men over a two-year period in ibid., especially Gowan to Mowat, March 28, 1876, and Mowat to Gowan, July 8, 1876. See also the detailed but incomplete account of the labours of the Commission in Fisher, "Pioneer Judge," pp. 59-64. For less detail, but a more complete picture, see the account in R.S.O. 1877, II, 2467.

[50] Gowan to Mr. Justice Taschereau, draft, April 17, 1880, Gowan Papers, reel m 1938.

[51] Friedland, "Wright's Code," p. 313.

[52] House of Commons, *Debates*, February 27, 1877, p. 327.

[53] Ibid., April 21, 1887, p. 1668.

[54] Although research in Blake's papers has failed to turn up Gowan's letter, the facts in it are attested to by Blake's reply. There is little doubt that Gowan offered Blake Wright's code because Blake describes it as "the draft in your possession" (Blake to Gowan, June 28, 1877, Gowan Papers, reel m 1937), which is essentially the way Gowan described it when he offered to lend it to Taschereau in 1880. See above, p. 290, and also Gowan to Taschereau, draft, April 17, 1880, Gowan Papers, reel m 1938.

[55] Blake to Gowan, June 28, 1877, Gowan Papers, reel m 1937.

[56] Friedland, "Wright's Code," p. 307.

[57] Ardagh, Gowan, pp. 71, 182.

[58] Carnarvon to Gowan, June 27, 1878; Cairns to Gowan, July 14, 1878, Gowan Papers, reel m 1897.

[59] Cairns to Gowan, July 18, 1878, Gowan Papers, reel m 1897.

[60] Zebulon A. Lash, Deputy Minister of Justice to James Cockburn, M.P., April 28, 1881; Canada, Parliament, Sessional Papers, 1883, No. 17, p. 9. Cockburn was appointed Commissioner of the Dominion statute consolidation project in 1881 and wrote to the Minister of Justice asking for the drafts Langton had prepared.

[61] Henry J. Morgan, The Canadian Men and Women of the Time (Toronto: William Briggs, 1898), p. 760; Donald Creighton, John A. Macdonald: The Old Chieftain (Toronto: Macmillan, 1965), p. 154.

[62] Gowan to Macdonald, November 15, 1878, Macdonald Papers, reel c 1600.

[63] Loc. cit. Nor is there any correspondence between this most prolific letter writer and James MacDonald.

[64] Legal News, 2 (1879), 13, 19-24, 27-31; see also 1 (1878), 69, 431; 3 (1880), 113, 169.

[65] House of Commons, Debates, March 16, 1879, p. 223.

[66] Gowan to Macdonald, April 8, 1879, Macdonald Papers, reel c 1600.

67 Loc. cit.

[68] Savary to Macdonald, February 24, 1879, Macdonald Papers, reel c 1715.

[69] Senate, Debates, May 7, 1879, pp. 427-73.

[70] Ibid., pp. 474-75.

[71] Ibid., p. 475.

[72] Loc. cit.

[73] Economic questions, the preliminary moves in the effort to build the Canadian Pacific Railway and prospective immigration to the North-West all bulked large in John A. Macdonald's mind at this time. See Creighton, Old Chieftan, pp. 243-305.

[74] House of Commons, Debates, March 1, 1880, p. 306.

[75] Gowan to Macdonald, December 31, 1879; May 19, 1880, Macdonald Papers, reel c 1600.

[76] Snell, Supreme Court of Canada, p. 26.

[77] Taschereau to Gowan, March 15, 1880, Gowan Papers, reel m 1899.

[78] The words in parentheses were crossed out by Gowan and the draft ends without the sentence being completed. Gowan to Taschereau, draft, April 12, 1880, Gowan Papers, reel m 1938.

[79] Gowan to Taschereau, draft, April 17, 1880, Gowan Papers, reel m 1938.

[80] Taschereau to Gowan, April 21, 1880, Gowan Papers, reel m 1938.

[81] Canada, Statutes, Acts of the Parliament of Canada Relating to the Criminal Law (Ottawa: Queen's Printer, 1881).

[82] Creighton, Old Chieftain, pp. 284-316.

[83] See Macdonald Papers, reel c 1659, "Correspondence between Sir John A. Macdonald and the Hon. James MacDonald 1875-1881." P.B. Waite asserts that James MacDonald "was no political lion," and quotes Sir Hector Langevin as saying that MacDonald "was an utter failure in politics." Man From Halifax, p. 102. Sir John Thompson, who served on the bench with MacDonald for four years, did not hold him in high regard as a judge either. Thompson to Prime Minister Macdonald, August 20, 1888, Macdonald Papers, reel c 1683.

[84] House of Commons, Debates, March 10, 1881, p. 1328.

[85] Loc. cit.

[86] Loc. cit.

[87] Macdonald to Cockburn, March 30, 1881, Macdonald Papers, reel c 33.

[88] DCB, XI, 196.

[89] Macdonald to Cockburn, March 30, 1881, Macdonald Papers, reel c 33.

[90] Canada, Parliament, Sessional Papers, 1883, No. 17, p. 8.

[91] Ibid., p. 11, Zebulon Lash to Cockburn, April 28, 1881; November 5, 1881.

[92] James MacDonald to Prime Minister Macdonald, April 7, 1881, Macdonald Papers, reel c 1659.

[93] Campbell, who was an effective Postmaster-General prior to his move to Justice, was prevailed upon by Tupper and Langevin to take the job but was not confident that he had the qualifications for it (Campbell to Macdonald, May 17, 1881, Macdonald Papers, reel c 1590). On the face of it the main drawback to the appointment was that Campbell was in the Senate. But in this case, the drawback was more apparent than real. Macdonald and Campbell, as in the past, formed a very effective team. Campbell did the work in Justice and controlled debate in the Senate, while Sir John was freed of detail, but was Justice spokesman in the Commons.

[94] Cockburn to Campbell, June 7, 1881; Lash to Cockburn June 8, 1881, Canada, Parliament, Sessional Papers, 1883, No. 17, p. 9.

[95] Ibid., pp. 11, 12. Lash to Cockburn, November 17, 1881; Lash to J.L. MacDougall, Auditor General, November 18; Lash to Cockburn, November 28, 1881.

[96] Ibid., p. 6.

[97] This number was calculated by Gustavus Wicksteed who published some of the Commission Reports which had not been printed as Sessional Papers. It included statutes from the following jurisdictions:

Dominion	612
Nova Scotia	86
Prince Edward Island	173
New Brunswick	147
The Canadas	215
British Columbia	61

"The Revised Statutes of Canada," Legal News, 10 (1887), 187-92; 11 (1888), 57-59.

[98] Canada, Parliament, Sessional Papers, 1883, No. 17, pp. 1-5. For an exhaustive analysis of the Commissioner's work, see Campbell's speech in the Senate, Debates, March 16, 1885, pp. 304-22.

[99] Alexander Ferguson to Campbell, May 1; August 1, 1882, Canada, Parliament, Sessional Papers, No. 17, pp. 7, 8.

[100] Campbell to Macdonald, September 7, 1882, Macdonald Papers, reel c 1590.

[101] Biographical material on Burbidge has been culled from a variety of sources, but principally from Russell, Autobiography, pp. 80, 81ff.; "Graduate of Mount Allison," The Argosy, 21 (1891), 28; C[harles] M[orse], "The Late Mr. Justice Burbidge," Canadian Law Times, 28 (1908),

222.

[102] Campbell to Macdonald, April 1, 1882, Macdonald Papers, reel c 1590.

[103] Loc. cit. The name is undecipherable. It appears to be "Connally." The problem with this interpretation is that there is no "Connally" or close variation of this name in any law list of the period.

[104] In the Department of Justice Letterbook, in use when Burbidge was appointed, there are twelve letters from Burbidge to Cockburn concerning the consolidation, and most enclose letters from all and sundry advocating change. PAC RG 13, A3, Department of Justice, Letterbooks, microfilm, reel c 14331. See, for example, page nunmbers 467, 488, 499 and 507.

[105] Campbell to Macdonald, September 7, 1882, Macdonald Papers, reel c 1590.

[106] Burbidge to Cockburn, October 12, 1882, PAC RG 13, A3, Department of Justice, Letterbooks, reel c 14332.

[107] House of Commons, Debates, February 21, 1883, p. 57; May 7, 1883, pp. 1040-41.

[108] Burbidge to Privy Council, April 28, 1883, PAC RG 13, A3, Department of Justice, Letterbooks, reel c 14335.

[109] Campbell to Macdonald, June 17, 1883, Macdonald Papers, reel c 1589.

[110] Burbidge to Carswell, the legal publisher, April 30, 1883, PAC RG 13, A3, Department of Justice, Letterbooks, reel c 14335.

[111] Ibid., May 18, 1883, reel c 14334. It is to be noted that Burbidge says "I," not "the Department" or "the Government."

[112] Ibid., reel c 14336, Burbidge to Joseph Colmer, High Commission Secretary, August 9, 1883.

[113] Ibid., Burbidge to Carswell, September 15, 1883.

[114] Campbell to Macdonald, June 17, 1883, Macdonald Papers, reel c 1589; Senate, Debates, March 16, 1885, p. 311.

[115] Senate, Debates, March 16, 1885, p. 312.

[116] Ibid., April 2, 1884, p. 404. According to the Editor of the Legal News ["Report of the Commissioners," 7 (1884), 359], Burbidge's draft was a "Code of Indictable Offences," so, presumably, it did not subsume offences punishable on summary conviction. More cannot be said with certainty because a copy of this document has not yet been discovered.

[117] Senate, *Debates*, April 2, 1884, p. 404. For the favourable reaction of legal editorialists to the draft code, see "The Consolidation of the Statutes," *Canadian Law Times*, 4 (1884), 432; "Report of the Commissioners," *Legal News*, 7 (1884), 358-59.

[118] Senate, *Debates*, April 2, 1884, p. 405.

[119] Ibid., p. 404.

[120] Ibid., March 16, 1885, p. 312.

[121] Burbidge to Campbell December 11, 1884, PAC RG 13, A2, Department of Justice, letters received, microfilm. For the Report see "The Revised Statutes of Canada," *Legal News*, 10 (1887), 188. This may not be the full text. The actual Report was part of Canada, Parliament, Sessional Paper 21 for 1885, which was not published.

[122] In essence: the Senate did not have the authority to initiate money bills. The Consolidation was a money bill in the respect that public revenue was appropriated to enforce its provisions. But as it was a consolidation which made no changes in existing law, the Senate would not have been initiating these measures. Rather, it would have been transposing them from one form to another.

[123] The first edition of his *Parliamentary Procedure and Practice* (Montreal: Dawson Brothers) was published in 1884.

[124] John Bourinot, "Memorandum as to the right of the Senate to consider in the first place the Consolidated Statutes of Canada," January 19, 1885, Macdonald Papers, reel c 1701.

[125] Senate, *Debates*, February 13, 1885, p. 48.

[126] There were Joint Committees on the library and printing, of course, but this was the first Joint Committee struck to examine substantive law.

[127] Senate, *Debates*, March 16, 1885, p. 306. The debate runs from p. 304 to 322.

[128] See, for example, Macdonald to Campbell, May 19, 1885, PAC, Sir Alexander Campbell Papers; "The Riel Triel," *The Globe*, July 11, 1885, p. 4.

[129] Creighton, *Old Chieftain*, pp. 409-17; Waite, *Man from Halifax*, pp. 126-33.

[130] House of Commons, *Debates*, April 24, 1885, p. 1226.

[131] House of Commons, *Journal*, 1885, Appendix 2, pp. 2-7.

[132] Campbell to Macdonald, May 20, 1885, Macdonald Papers, reel c 1591.

[133] House of Commons, Journal, June 30, 1885, p. 504.

[134] Waite, Man from Halifax, pp. 128-33.

[135] Alexander Ferguson had been retained to integrate the Statutes of the 1885 session in the Revised Statutes, and to make the amendments proposed by the Joint Committee. When he wanted advice and direction during the early days of Thompson's tenure he wrote directly to the Prime Minister concerning his work. See, for example, his Report to Macdonald of October 22, 1885, Macdonald Papers, reel 1773.

[136] House of Commons, Debates, March 3, 1886, p. 38.

[137] Ibid., p. 39.

[138] Loc. cit.

[139] Ibid., April 6, 1886, p. 513.

[140] Loc. cit.

[141] Loc. cit.

[142] Ibid., p. 514.

[143] Ibid., pp. 514, 516.

[144] Ibid., April 7, p. 555.

[145] Ardagh, Gowan, pp. 188-91.

[146] Gowan to William Hartpole Lecky, a British historian, March 10, 1885, Gowan Papers, reel m 1937; Senate, Debates, March 16, 1885, p. 304.

[147] From April 21 onwards, there is a steady exchange of letters between Gowan and Thompson until the latter's death in 1894. In 1886, the primary topic was the summary conviction bill which Gowan had drafted the previous year. See Thompson to Gowan, April 21, 1886, Gowan Papers, reel 1938. Gowan does mention the Revised Statutes, but only in passing, so it would seem that it did not arouse any controversy after second reading in the Commons; Gowan to Thompson, May 28, 1886, Thompson Papers, reel c 9238.

[148] Nearly 1300 Dominion and colonial Acts running to several thousand pages had been compressed into 185 chapters covering 2246 pages. An additional 260 pages recorded in detail the history and disposition of the original enactments.

[149] In terms of bulk, the situation in Canada was still much different from that in England, where the eighteen volumes of the Imperial collection took up the best part of a bookshelf. In Canada the legal professional could, with the addition of the one or two similar volumes of provincial enactments, provide himself with a complete set of

the statute law of his jurisdiction which would occupy no more than nine or ten inches of shelf space at a cost of less than $20.00. For example, the two volumes of the R.S.O. 1877 cost $6.00; the C.S.C. 1859, which was larger than either of the volumes of the R.S.C. 1886, could be had for $5.00, so it is unlikely that one of the latter would cost more than $5.00. Thus, the total outlay for an Ontario lawyer would be about $16.00. Morgan, Canadian Legal Directory, Annex, Carswell's Catalogue, pp. 7, 19.

[150] Thompson to D.D. Field, April 14, 1887, Thompson Papers, reel 10572. Unfortunately, a correspondence did not develop between Thompson and Field; at least, there is no trace of one in the Thompson Papers.

[151] House of Commons, Debates, March 3, 1886, p. 39.

[152] Loc. cit. This statement was incorrect, but no one challenged Thompson on the issue.

[153] The criminal statutes are R.S.C. 1886, c. 60 and cc. 139-85.

[154] R.S.C. 1886, c. 147, s. 9.

CHAPTER IX

In a profession which values above all the latest authority, be it case law or statute, publication of the Revised Statutes caused many ramifications. Not the least of these was that the 1881 volume of penal statutes was superceded. Burbidge moved quickly to rectify the situation by commissioning Charles H. Masters, a younger colleague from New Brunswick, to produce an updated version.[1] Masters was at that time an Assistant Reporter in the Supreme Court. He later became the Chief Reporter and a prolific author of legal texts, of which the volume of criminal statutes, published in the fall of 1887, was the first.[2] It was consecutively paginated and included, in addition to the criminal chapters from the Revised Statutes, a detailed and comprehensive index and table of contents which set out the chapters in chronological order.[3] Inevitably, proliferation had already set in. Eight criminal statutes enacted in the 1887 session were included as a separately paginated addendum. Moreover, their chapter numbers were those allocated to them in the sessional volume of 1887 and thus did not follow the order of the main work.

Mr. Justice Taschereau's Criminal Statute Law had also been rendered obsolete and he, too, moved quickly to replace it. Soon after the Revised Statutes came into effect, he informed the Justice Minister that he was working on a revised edition and requested that the Government purchase 400 copies so that he would not incur a financial loss through its publication.[4] Thompson diplomatically refused to make a block purchase, but did say that Government libraries would need some copies, as would most ministries, and that he would encourage such purchases.[5] In any event, the second edition of Criminal Statute Law went on sale in February 1888.[6]

The work retained the format of the first edition: that is, it was a reprint of the statutes with a commentary appended to most sections. Otherwise it was much changed. Eight hundred additional cases were cited, most being Canadian decisions determined since the enactment of the Criminal Consolidation Acts of 1869. The value of the work was also enhanced by Taschereau's association with Charles Greaves, for several of the annotations had been written by the latter or adapted from notes supplied by him. Reference to these and other changes was made easy in the enlarged and comprehensive index which had been prepared by Charles Masters, who also compiled the lists of statutes and cases cited in the volume.[7] But the most significant change was that although Taschereau still treated only indictable offences, he now also included all the relevant procedural law in a one-volume edition. Moreover, he had contemplated a more comprehensive work which would have included summary conviction offences and related law, but was dissuaded from proceeding with it by his publisher because of the prohibitive price of printing a two-volume edition.[8]

However, this project clearly foreshadowed a full-scale treatment of the penal law. During the following months, Taschereau worked out the scheme in detail and presented the Minister of Justice with an oral proposal for a criminal code during a meeting between the two men in the summer of 1889.[9] This gave Thompson food for thought. He was, like

Lord Chancellor Cairns, a systematizer, who all through his career had sought to make the law sure and certain and to direct a clear, fresh current through muddy and obscure legal backwaters.[10] Hence, the idea of a code appealed to him. But he was also a strong and partisan Conservative. Did he want one of the most important bills of the decade to be prepared by a Liberal appointee, Taschereau, when his friend and colleague Burbidge had already drafted such legislation?[11] Obviously not. At this point he received a letter from the Judge which presented the proposition to him in a formal manner.[12] He thus had two alternatives: he could accept Taschereau's offer or reject it.

If he opted for the latter choice, what options lay open to Taschereau? The Judge could draft a code, there was no doubt about that. And he could then have one of his Liberal colleagues introduce it in the House of Commons, if only to embarrass the Government.[13] There was ample precedent for such action, as Thompson well knew. William Woodhouse had introduced a criminal code bill in the Imperial House of Commons in 1880, on the same day Sir John Holker had brought in the government sponsored legislation.[14] Closer to home, Martin Cameron, Liberal M.P. for Huron, had, annually for five years, introduced criminal evidence bills, one of which had passed all stages in the Commons and did not suffer defeat until second reading in the Senate.[15] Hence, if Thompson refused Taschereau's offer, he would have to convince the Judge that he would be wasting his time drafting legislation which the Justice Department already had in hand. This he evidently did because, although there continued to be frequent correspondence between the two men, no more is heard of this matter until the fall of 1892.[16] This then is the genesis of the plan which would eventuate in the

Canadian Criminal Code.

Meanwhile, on Thompson's recommendation, Burbidge had been appointed to the bench as the first Justice of the Exchequer Court, which tribunal had been separated from the Supreme Court in 1887. Although fully occupied organizing the Court and hearing cases, Burbidge still found time to advise Thompson on matters pertaining to the Department of Justice for a considerable period after his promotion.[17] When this extracurricular activity began to diminish, he decided to put his extensive knowledge of penal statutes and codification to good use by writing a comprehensive treatment of substantive criminal law, both common and statute. To give his work added weight and authority he, like Taschereau before him, allied himself with the leading contemporary authority on English criminal law by obtaining Sir James Fitzjames Stephen's permission to follow the plan of his Digest of 1877.[18]

But Burbidge was much more than merely an editor. In large measure his quotations from the original occur only when Stephen, in his concise and economical format, defined an offence or a term rendered from the verbosity of the common law.[19] In fact, from a total of 629 articles, only 234, or parts thereof, are quoted verbatim from Stephen. Thus, well over 60% of the work was written by Burbidge, who effected a similar compression of the criminal law of Canada and the provinces.[20] Moreover, he improved on the original by including not only indictable offences, but also the summary offences of the several jurisdictions. And to his own work, as well as to Stephen's, he added notes for practitioners, supported by copious references to Canadian cases. The comprehensive index and the table of cases and statutes cited in the volume were prepared by Charles Masters, who was himself engaged in the preparation of a companion volume of procedural law on the same model.[21] Together, these two volumes would have subsumed all the criminal law of Canada and would thus have improved on Stephen's Digest, which included only indictable offences, and Taschereau's volume, which treated only statute law. However, events overtook Masters before he was able to get his book into print.

Immediately after receiving Taschereau's formal offer to draft a criminal code on October 23, 1889, Thompson told Burbidge that he intended to codify the criminal law and evidently gave him the impression that a bill would be introduced to effect this in the coming session.[22] Burbidge, whose Digest was to appear in December, asked the Minister to delay the measure because of the effect it would have on the sales of his book, an appeal to which Thompson apparently lent "an indulgent ear." However, after some reflection, Burbidge then wrote to the Minister to apologize for his selfish request and urged him to proceed with the legislation forthwith.[23] Moreover, as was his custom, Burbidge also gave him some good advice.

One of the major flaws Burbidge had identified in the English draft bills was the provision to abolish the use of the words "felony" and "misdemeanour" in the attempt to get rid of the procedural distinctions between the two classes of crime. In his view "it would be unfortunate to lose from our law such convenient words," and he suggested that in any Canadian legislation they be retained and redefined in terms of punishment. In short, a felony should be punished by death or imprisonment in a penitentiary, and a misdemeanour by imprisonment in a common gaol for any period less than two years. This was, of course, a proposal to classify offences according to an immediately comprehensible and rational scheme, similar to the systems used in the civilian codes of the Continent. If the concept had been elaborated, extended to summary conviction offences and inserted in the introductory matter of a bill, it would have constituted a satisfactory general part of a code. Although Burbidge did not put the proposal in such a direct manner, there is no doubt that he recognized the need for such a provision, explicit or not, and was attempting to influence Thompson to proceed in this direction. His effort was in vain, for there is no further mention of the matter in their correspondence. Nor was there mention of codification during the next session of Parliament, a circumstance which ensured that Burbidge's Digest, which received excellent reviews, sold well during 1890.[24]

Shortly after the session, Senator Gowan returned from Europe where he had been touring since the summer of 1889. As we have seen, he was displeased that no action had been taken as a result of his speech on the abolition of the grand jury, and wrote to the Prime Minister to voice his displeasure. Whether Macdonald sent Gowan's letter to the Minister of Justice or whether he spoke to him directly is not known, but whatever occurred, it galvanized Thompson into action not only in the matter of the grand jury, but also with regard to codification. In his circular letter to the judiciary, he couched the question of the grand jury within a larger framework by explaining that he wanted an expression of their opinion, so that it could be incorporated in "a bill codifying the criminal law of Canada, both as regards substantive law and procedure," which he intended to "lay before parliament in the near future."[25] Before the letter was in the mail, Thompson had made provision for the drafting of a codification bill.

Sometime after their conversation in the fall of 1889, Thompson had again broached the subject of a criminal code to Burbidge and to his successor as Deputy Minister of Justice, Robert Sedgewick.[26] They shared Thompson's enthusiasm for the project and agreed to draft the necessary legislation in the Department of Justice with the aid of Charles Masters after the session of 1890.[27] This was not normal practice, for it was the duty of the Law Clerk of the House of Commons, then Frederick McCord, to draft all public bills.[28] However, when Sedgewick relieved McCord of the responsibility for preparing a lengthy enactment, it became possible to pay Masters, a salaried civil servant, for the work he had already done on criminal procedure, presumably the subject for which he was to be responsible in the bill.[29] More importantly, it also ensured that the legislation was written exactly as Thompson wanted it and that the confidentiality which Sedgewick had enjoined upon McCord was kept.

By the following spring, Bill 32, the "Criminal Law Act of 1891," was ready to be introduced to Parliament.[30] At first sight it resembled the English Draft Code of 1880. Under the rubric "Arrangement of Titles" the first six titles, which laid down the substantive law, were taken from the Imperial model almost verbatim. Here the resemblance ceased. Where the latter had only one further title, "Procedure," there were four in the Canadian bill for a total of ten. In turn, these were divided into seventy parts and 1005 sections covering 331 pages. Thus, it was over one third longer than the Draft Code of 1880. Turning the page to the "Table of Contents" reveals that again there was a superficial resemblance between the matter covered in both works by the parts and sections of the first six titles, but almost none between the procedural divisions. However, it is not until the actual content of the 1891 bill is analysed that it becomes apparent how much "Canadian content" it contains.[31] In the substantive titles there are a total of 530 sections. 209 are taken verbatim or paraphrased from the English model; 321 are condensed from Canadian models or are new matter. The procedural titles contain 475 sections; 394 are Canadian and only 81 English. Thus 715 sections, or well over 70% of the Dominion legislation, was drafted by Burbidge, Masters and Sedgewick in the terse and economical style developed by Stephen. As in Burbidge's Digest, much of the matter quoted from Imperial sources consists of definitions and terms condensed from the common law.

Thus "larceny" disappears from the statutory vocabulary and is replaced by "theft," which is defined as follows:

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen . . . .[32]

Murder is defined, assault is defined, rape is defined and, for the first time in any British statutory compilation, the common law offence of sedition is defined and elaborated.[33] In fact, nearly every "Part" in the substantive titles opens with a section defining the crime dealt with in that division. To today's reader there is nothing remarkable about this legislative style--in fact, one would have difficulty conceiving of an offence which was not defined by statute. But in 1891 it was revolutionary. If the bill became law, anyone could inform himself exactly what elements constituted any given offence by merely reading the code. It would not be necessary, for example, to assimilate the two chapters of arcane knowledge on larceny in Stephen's Digest, in order to understand the straightforward definition of theft quoted above. Moreover, the latitude of a judge to distinguish common law precedent in order to arrive at a definition of a crime which, in his view, suited the circumstances--in a word, to exercise quasi-legislative authority--was severely circumscribed.[34]

Another major change was the abolition of the distinction between felony and misdemeanour (s. 533), the reform advocated by Stephen and developed in the several Imperial bills. It is emphasized that this did not introduce any new crimes, eliminate any old ones, or alter any punishments. Murder, a felony, was still murder and punishable by death; forging trade marks, a misdemeanour, was still forgery and punishable by two years' imprisonment. Both crimes, however, were defined in Bill 32 as being "indictable offences" and the words "felony" and "misdemeanour" disappeared. The fundamental change was that the procedure to deal with such crimes was standardized. No longer, for example, would the forger have the right to bail and no longer could he sit at the courtroom table beside his counsel when on trial. He would now be bailable on the same terms as the murderer and he would have to stand his trial in the dock.[35]

A particular feature of the new procedure, which must have given the Minister of Justice considerable satisfaction, was that it would reduce considerably the power of the grand jury. To begin with, the jurors would no longer be allowed to initiate an investigation if it was suspected that an offence had been committed. That power was to be vested in justices of the peace or other magistrates who were to be authorized to summon potential witnesses and examine them on oath (s. 557). Furthermore, it will be recalled that at common law the presentment of a crime, an indictment, could be made on the initiative of a grand jury, or any person could make an accusation before the jurors in the form of a bill of indictment, which they could endorse as a true bill or reject. Bill 32 (ss. 636, 637) would abrogate these rights and vest them in the bench and Crown law officers. They alone would be allowed to prefer bills of indictment to the grand jury directly or indirectly, by granting permission to a person to proceed with an accusation. Thus, the only criminal function remaining to grand jurors would be to endorse or reject bills of indictment sent to them by legal officials.[36]

At first sight it appears anomalous for the smaller, less sophisticated Dominion to have considerably more criminal law than the Mother Country. The anomaly is explained by the fact that the legislation subsumed all the criminal law of the jurisdiction. As we have seen, its first six titles included the substantive law pertaining to indictable and summary conviction offences, from both common and statute law; and the last four laid down all the procedural law necessary to operate the criminal justice system, and again all relevant common and statute law was included. Moreover, the Canadian legislation improved on the civil law variants of codification which uniformly followed the French practice of publishing the criminal law in two volumes--one for substantive rules and one for procedure. If one is not aware of this fact the Continental codes appear to be much shorter and more concise than the Canadian, but the perspective alters considerably if both volumes are taken into account. The contemporary German collections run to a total of 876 sections; the French to 1026.[37] Hence, with 1005 sections (983 in the enacted Code of 1892) set out topically in relatively short, concise sentences, Bill 32 fell comfortably in between the two older Codes in terms of bulk.

By any standard, the Bill of 1891 was a considerable work of legal scholarship. It followed the outline and format of English models which had been refined by several Law Commissions and sessions of the Imperial Parliament, and included much of the work Fitzjames Stephen had accomplished in defining the rules of common law. To this was added the considerable bulk of Dominion and provincial criminal law condensed, refined and rewritten. But there were some omissions and it was not as perfect a compilation as it might have been. It did not, for example, purport to be exhaustive of the penal law, nor did it contain a provision to abrogate the common law, as the English models had. Nor was there any mention of Burbidge's concept of a general part.

These omissions were deliberate. The Minister of Justice knew exactly what he needed in his bill to assure its smooth passage through Parliament and he instructed his draftsmen accordingly. There was, for instance, no mention of the abrogation of the common law, one of the largest rocks on which the Imperial bills had foundered because there was no need for it. What most people, laymen and legal professionals alike, failed to perceive, or at least to comment on if they did, was that Thompson achieved substantially the same result, notwithstanding this omission. Most of the common law pertaining to crime had been incorporated in Bill 32, and once that legislation was enacted, such provisions became statute law and, *ipso facto*, the common law doctrine on the subject was abrogated.[38] Hence, in this one area alone, Thompson's legislation would cause fundamental change in the criminal justice system and it was by no means the only alteration.[39]

All the other changes were cloaked in the authority of a bill modelled on the Imperial draft codes of the previous decade. Moreover, since the controversial measures in these bills had been thrashed out in Lords and Commons and discussed by the Royal Commissioners of 1879, Thompson could adopt their arguments to support his legislation, in particular the abolition of the distinction between felony and misdemeanour. However, it would be one thing to follow the Imperial text and argument on a measure which changed nothing but procedure. It would be quite another to attempt to pass legislation made in Canada which would retain the words "felony" and "misdemeanour" but redefine the terms of punishment. Then each offence would have to be allocated to one or the other category, a procedure which would provide Parliament with an inexhaustible source of controversy. Reform was Thompson's objective, not interminable debate. Wisely, therefore, but perhaps reluctantly, he stuck to the English model and did not implement the sensible but impracticable suggestion of Burbidge, which would have given the Canadian Code a general part.

Meanwhile the routine of the Justice Department continued. A new volume of the criminal statutes was compiled and published to reflect the many penal enactments since the Revised Statutes had come into force in 1886.[40] Like its predecessors, this volume would not long be current, for suggestions for further amendments were already flowing in from bench and bar in answer to Thompson's circular letter. One of the first of these was from Senator Gowan, to whom the knowledge that the Minister of Justice was contemplating the introduction of a criminal code appears to have come as a complete surprise.[41] Although the volume of correspondence on legal matters between the two men had remained constant even during Gowan's recent trip to England, this was the first mention of codification in their letters and the first time Gowan had addressed the topic since his exhortations to the Prime Minister in the early 1880s. Thereafter, it was a prime topic and in addition to giving Thompson exhaustive accounts of past efforts to systematize the penal law, he offered advice, assistance and encouragement until well after the enactment of the Code.

Thompson was punctilious in thanking the Senator for his efforts and often incorporated his detailed suggestions for amendment in the legislation. But he rarely followed Gowan's advice on tactics, and then only when he had previously decided on the same course of action.[42] Nor did he volunteer any information. When, for example, Gowan first learned of the project, he attempted to procure a copy of the legislation from James Adamson, the Clerk of the Senate, who passed the request to Thompson. No copy was forthcoming, for as Thompson told Adamson, the bill had not been completed and, indeed, the draftsmen had been at work for less than a month.[43] The Senator did not receive a copy until six months later, well after its introduction in the Commons. It is thus evident that Thompson played his cards very close to his vest and did not reveal his intentions or his plans even to close friends or colleagues such as Gowan, unless the individual in question played some part in those plans.

Soon after 3 o'clock on the afternoon of May 12, 1891, the Minister of Justice introduced Bill 32 in the Commons and moved first reading. Since members did not have a copy of legislation at this stage, it was, according to Bourinot, the duty of a bill's sponsor "to explain clearly and succinctly its main provisions."[44] Thompson was certainly succinct. He said:

> The object of this Bill is fully expressed by its title. It is intended to be a codification of the Criminal Law as well as of the Statutes relating to the Criminal Law of Canada, and it has been prepared principally on the model of the Imperial codification.[45]

That was all. Had there been no questions, the Speaker would have put the question and moved on to other matters. But there were questions. Sir Richard Cartwright, the fiscal critic for the Opposition, wanted to know whether simple codification was in prospect or whether the Minister intended to "introduce any alterations, more or less, of the existing Criminal Law. . . ."

Sir JOHN THOMPSON.	The Bill includes a number of changes in the law.
Sir RICHARD CARTWRIGHT.	Are they changes of any considerable importance, because this is a matter of general interest?
Sir JOHN THOMPSON.	They are only of the nature of such amendments as will be made in the shape of a Bill to amend the Criminal Law generally. Fundamental changes such as have been discussed in the press during the last few months are not touched on by this Bill, because it is deemed better that they should form the subject of discussion during the progress of the Bill, or of other Bills which may be introduced. The scope of this Bill is confined to the codification of the laws, with ordinary and subordinate amendments.

David Mills, a future Minister of Justice, wanted to know if it was intended to abolish the distinction between misdemeanour and felony. Thompson replied: "It is proposed to abolish that distinction." Louis Davies, a future Chief Justice of the Supreme Court, made the point that if there were a large number of amendments in the bill, it would not be possible to enact it during the session. If such were the case, he supposed it to be the Minister's intention to have it printed and distributed to members, but not to proceed further. Thompson agreed and said that he intended to move second reading later in the session, at which time he would state "briefly what the amendments are . . . and ask the direction of the House whether it will be proceeded with further or deferred until the next session." The whole course of the exchanges does not take up one column of print and most of the words spoken were uttered by members of the Opposition. Except for his second answer to Cartwright, Thompson was brief to the point of obscurity. Moreover, in view of the radical alterations his bill would make to the criminal justice system, that answer can only be characterized as the highest quality parliamentary doubletalk.

All in all, the first reading of Bill 32 is in sharp contrast with the course of events in the Imperial House of Commons where the account of the first reading of Stephen's Draft Code in 1878 covered twenty-three columns, while first reading of the Commissioners' Bill of 1879 rambles on for thirty-seven columns, and Sir John Holker seems positively garrulous in comparison with the taciturn Thompson.[46] However, since there is good reason to believe that the Minister had read and analysed those debates in Hansard and thus knew that Holker had invariably raised the hackles of the Opposition during first reading, it is probable that his plan was to say as little as possible and thus avoid giving his critics targets to shoot at.[47]

Minutes after resuming his seat, Thompson was summoned to the Prime Minister's office to assist in discussions with the Governor General. It was at this meeting that he became aware that Macdonald was seriously ill.[48] Thereafter, he assumed many of the Prime Ministerial duties and after Macdonald's death on June 6, he became Government Leader in the House of Commons. Thus, in addition to these added burdens and his own duties as Minister of Justice, Thompson became intimately concerned with the investigation of the Langevin-McGreevy scandal and the Mercier enquiry.[49]

For all of these reasons, and probably because it also suited his purpose, there was no second reading of Bill 32 in 1891, and members remained in ignorance of the amendments it incorporated. Moreover, there is some doubt when the Bill itself was finally printed and distributed to the members.[50] What is known for certain is that on July 3, Thompson asked the Printing Committee to authorize his request for 2000 copies of Bill 32 for a wide distribution. The Committee assented on July 31 and early in August, the Justice Department began to mail copies to bench, bar and leading members of the public.[51]

Unlike the virtual silence which had greeted Senator Campbell's distribution of the draft of the Revised Statutes in 1884, the response to Bill 32 was immediate and gratifying. This was hardly surprising, since it was perceived to have been written so as to be intelligible to the general public. W.F. Haskins, a Dunnville banker, epitomized this perception when he remarked that "even village scribes and we laymen can read [Thompson's] laws understandingly."[52] Replies began to trickle in within a week and, in a sense, the flow continues unabated today.[53] Responses came from the whole spectrum of the criminal justice system. Indeed, some, such as Senator Gowan and William Boys, a lawyer from Barrie, reviewed the whole code and made innumerable suggestions for major and minor amendments.[54] Most, however, were content to comment on one or two sections. J.W. Johnson, the Mayor of New Glasgow, wanted to enlarge the prohibition of cutting holes in ice and leaving them unguarded.[55] The Department of Agriculture urged that a provision be included to prevent the abuse of immigrant girls.[56] F.C. Cribben, the

Secretary of the Trades and Labour Council of Toronto, was concerned to see that the existing law regarding the exemption of trade unions from charges of conspiracy for organizing strikes had not been incorporated in the draft; he suggested that it should be.[57]

At the other end of the scale, Roger Clute, a Belleville barrister, suggested that a system of graded degrees of murder be instituted.[58] On occasion Sedgewick asked a correspondent such as the Attorney General of Ontario for advice on a specific section and, in the case of the Reverend James Bogert of the Children's Aid Society, he went so far as to ask that proposed amendments be submitted in draft form.[59] The judiciary was well represented in the correspondence, but its recommendations tended to be concerned with procedure and technical details. However, there were no submissions from the Supreme Court bench nor, in particular, from Mr. Justice Taschereau. It may be that he was not on the distribution list for a copy of Bill 32. But even if he were, it would have been sent to the Court long after the summer term had ended in early July and after he had left Ottawa either for his summer residence in Rivière du Loup or for one of his frequent overseas vacations.

In spite of the lack of input from the senior bench, the system of soliciting advice from the public worked well and during the fall and winter, some of the suggested amendments were incorporated in the draft. Altogether, twelve sections were deleted, thirteen new ones were added and many, such as section 132 on defrauding the government (thanks, no doubt, to the Langevin-McGreevy Investigation) were enlarged or rewritten. But all the amendments concerned detail. There were no fundamental alterations and Bill 7, the 1892 Draft Code, was little changed in appearance, numbering or rubric from its predecessor.

First reading was on March 8, 1892, early in the session. Thompson was even more succinct than in 1891. He said:

> This Bill is substantially the same as that introduced last session, but it contains some improvements which have been suggested in consequence of the circulation of the Bill, and which I will explain to the House more fully on the second reading.[60]

There were no questions and the motion passed without comment. Second reading was set for April 12. Bill 7 ran to just over 300 pages and by the rules of Parliament it was supposed to be distributed to the members prior to second reading, so that they could inform themselves of its contents and thus see how it differed from the 1891 version. However, considering the subject matter and the events of the previous year, it is probable that for most members this would be the first time they had read any version of the legislation. Therefore, if they were to make any intelligent contribution to the debate on the principle of the Bill, it was vital that it be distributed as soon as possible.

On April 4, Sedgewick asked Samuel Dawson, the new Queen's Printer, when the bill would be ready for distribution. To his anger and dismay he found that, because of some administrative misunderstanding between Dawson and McCord, the Law Clerk, only forty-eight pages had been printed. If, said Dawson, the remaining page proofs were returned to him promptly, it would take another ten days to complete the printing: that is, the complete Bill would not be ready until April 15. Thompson apparently took a hand at this juncture, with the result that Dawson promised to run four presses round the clock and deliver the bill on April 12.[61] He did not keep his promise and when second reading was due, the members still did not have a copy of the legislation.[62]

Nevertheless, the Minister pressed ahead. Indeed he turned the event to his advantage, for he could tell the House only what he wanted to and as much or as little as he thought necessary. Without the legislation in their hands, the members of the Opposition could not contradict or question him on substantive issues; they could only discuss what he chose to tell them. He told them very little.

Second reading came on after evening recess. At seven-thirty Thompson rose from his seat and began the debate disarmingly by asking the House for its indulgence to allow him to proceed with the Bill without its distribution having occurred.[63] He told the members that he was still receiving "valuable suggestions for its improvement," and went on to outline what was in prospect. To facilitate the passage of the legislation, he intended to follow the precedent set during the passage of the *Revised Statutes* and, for the second time in Canadian Parliamentary history, to move for the formation of a Joint Committee of the House and the Senate to consider a substantive measure. He hoped to have the Bill distributed before Parliament adjourned the next day for Easter, so that the Committee could study it over the recess and thus enable its members to begin work promptly when business resumed. Thompson then went to the heart of the matter.

> The objects of the Bill are very tersely expressed in one passage of the report of the Royal Commission which investigated the subject of the criminal law in England, in defining the effort at codification in a similar Bill in Great Britain in these words:
>
> > It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. *It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure both as to indictable offences and as to summary convictions.*[64] [my italics]

But what Thompson said was not completely true. The first sentence of the passage is indeed a verbatim quotation; the italicized sentence is not.[65] Nothing even remotely like it can be found in the Report, which treats only indictable offences. Thus the Minister cloaked a major Canadian initiative, the inclusion of summary offences, with the authority of the Imperial Parliament.

He also put Canada last when he enumerated the sources of the Bill. These were, he said, the English Draft Code of 1880, Stephen's Digest, Burbidge's Digest and Canadian statute law. Nor was there any mention of the colonial codes of the 1850s or the later Canadian attempt at codification in 1884. Instead, he extolled the efforts to codify the law which had been carried on at Westminster over the preceding sixty years, and the "immense help" these had been "in simplifying and reducing into a system of this kind our law relating to criminal matters and criminal procedure." Following this encomium, he specified the main divisions of the legislation by quoting the titles of the Bill which, it will be recalled, were copied almost verbatim from the Imperial Bill of 1880. Only when it became necessary to emphasize that the legislation would not abrogate the common law did he leave momentarily the protective cover of the English experience to explain that,

> [the] Bill aims at a codification of both common law and statutory law relating to these subjects, but that it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes. In other words, the common law will still exist and be referred to, and in that respect the code, if it should be adopted, will have the elasticity which has been so much desired by those who are opposed to codification on general principles.[66]

He specified seven changes, including the substitution of "theft" for "larceny" as a legal term, and the abolition of the distinction between felony and misdemeanour, and again bolstered his argument with copious references and quotations from the Imperial Commissioners' Report.

At this point he eased into a discussion of the "proposed abolition of the system of indictment by grand jury," during which he reviewed the question exhaustively.[67] He made no bones about being an abolitionist, but concluded by saying that, reluctantly and not withstanding his personal preference, he would "delay any request to Parliament to alter the law with regard to this system," because no replacement for it had yet been developed. We know that this very issue had been a prime reason for the defeat of Thompson's administration in Nova Scotia and that he had voiced reservations about its practicability at the federal level more than a year before. It is thus evident that this part of his speech is really a large bone for the Opposition to chew on, in place of the plentiful helpings of prime beef they would have found in Bill 7. Moreover, in saying what he did, the Minister was less than frank with the House, because nowhere in his remarks is there mention of the extensive measures in the Bill to limit the power of the grand jury.

In total, Thompson's speech covers four columns of print. The first is taken up with incidental information, the second addresses the content of Bill 7, and the last two are devoted entirely to the grand jury. Because of this very effective smoke screen and because of the way Thompson phrased his remarks, the perception of the House was that there was to be no fundamental alteration in the legal system--no tampering with the common law--and that he had made a large concession to the Opposition on the question of the grand jury. This perception is evident in the speech of the Leader of the Opposition, Wilfrid Laurier, who said, in part, in his first sentence:

> . . . [A]s the purport of the Bill is what the Hon. gentleman has just explained, that it will not introduce any great changes but is to put in statutory form what has already existed by statute modified by the opinion of eminent jurists, I think it may go at once to second reading.[68]

The remainder of his speech was devoted entirely to the grand jury. So was the speech of the only other speaker, David Mills, the Opposition Justice critic.[69] Predictably, the debate ended amicably. Thompson then named the other members of the Commons who were to sit with him on the Joint Committee, the motion was put ~~and~~ the Bill passed second reading. Thus the House had agreed in principle to the Criminal Code.

Sir John Thompson's biographer tells us that the Minister was not a well-read man with a love of literature, but that he did take "immense trouble to master his facts."[70] Hence, it is virtually certain that he did read the Imperial Hansard to establish the facts concerning earlier attempts at codification.[71] It may well be that in reading Sir Robert Peel's speeches on the passage of his criminal law bills in the 1820s, Thompson assimilated Francis Bacon's precepts at second hand. If he did not, his achievement at the termination of debate on second reading is all the more impressive because, knowingly or not, he had followed the Lord Chancellor's principles and, as had Peel, improved on the model. The law had been condensed and brought to a smaller compass in a rational arrangement. A Joint Committee would examine the Bill, change what it saw fit to change and recommend the result to Parliament. When the Bill came into force, all other statute law on the subject would be repealed, but Thompson, like Bacon, emphasized that he had no intention of abrogating the common law. In addition, he had addressed all the other concerns expressed by members of the Imperial Parliament in the codification debates of the 1870s.

The Canadian Draft Code was comprehensive, that is to say, it included both indictable and summary offences. It had been drafted at minimal cost by persons answerable to a Minister of the Crown, who had not only welcomed suggestions for the improvement of his Bill from all sections of society, but who had actively solicited such assistance. Finally, his verbal presentation was superb. He did not attempt to philosophize or to delve into the history of codification;[72] he did not raise the Members' ire by telling them that they had to take his legislation on trust; he did not tell them that he intended to make numerous large alterations, nor did he dwell on the few he mentioned. He told the House very little and vested his Bill with the authority of Westminster by clever phrasing and by copious quotation to support the few substantive statements he did make. In short, he gave the Opposition very few targets to shoot at, except a large and tempting bull's eye which he conjured up for their benefit.[73] Anything less like Attorney General Holker's procedure and his speeches in the Imperial House would have been hard to imagine.

Hence, the Minister must have been chagrined, if not exceedingly displeased, when he read the speech Senator Gowan delivered in the Senate on the same day on which he moved second reading in the Commons. The occasion for the speech was a motion sponsored by Senator Abbott, the Prime Minister, to name the members of the Senate who would sit on the Joint Committee. Abbott spoke very briefly. He told the members that the Draft Code would be read that day in the Commons and that its sponsor would move for the formation of a Joint Committee. He was careful to point out that the reason for this unusual procedure was to allow the Senate to "participate in the consideration of the detail of this Bill, and so be in a position to pass it through this House without delay as it is not improbable that it may be late in the session before it gets through the other House."[74]

His motion was merely a necessary formality, one of the many which go through "on the nod." In this case it did not. Senator Gowan rose and spoke for nearly as long as Thompson in the Commons. Considering what he said and how it was phrased, it could have been Holker or Fitzjames Stephen speaking. He opened with complimentary remarks about the formulation of the Bill, and went on:

> I do think the Bill by far and away the most complete codification of the Criminal Law that has ever been submitted to any legislative body. But it involves gigantic changes. It in effect wipes away a large portion of that great depository of British law--the Common Law of England--as relates to the Criminal Law--that grand beacon-light of English jurisprudence, with its many reflectors, formed with wonderful skill and developed and brightened by the keenest intellects in many a conflict of opinion amongst England's jurists. It reduces to legislative expression many rules and principles found in the Common Law--in a word, it reduces to a code the whole floating body of the Criminal Law of Canada.[75]

It was lucky for Thompson that the Bill had not been distributed or Gowan may have stirred up a hornets' nest by giving some concrete examples of the "gigantic changes." As it was, his auditors obviously believed that he was indulging in senatorial hyperbole, for this portion of his remarks did not elicit a response. He continued to elaborate the theme for some time and then, quite gratuitously, raised the question of which House the Bill should have been introduced in--a question which had been settled years before by Senator Campbell and John Bourinot. Gowan agreed that it should have originated in the Commons and that it should be sent to a Joint Committee, because "in a deliberative body composed of men who are not experts, it is difficult to deal with technical questions of this kind."[76] Predictably, these sentiments did not sit well with his colleagues. Senator Kaulback of Nova Scotia, himself a lawyer and a Conservative, thought Gowan's remarks were "rather premature" and was irritated by their purport, as he makes clear in his conclusion: "I wish to express my disagreement with the hon. gentleman's opinion as to the fitness of the Senate for initiating a measure of this kind."[77] This put an end to the discussion.

As a source of information on what had gone before, Gowan was unequalled; as a legislative draftsman, he was without peer; but as a Parliamentary tactician he was a booby. By making such a speech he was, unwittingly, sabotaging the Minister's carefully laid plan. Thompson must therefore have given a sigh of relief when he learned that Gowan would be prevented from giving any more provocative speeches for the foreseeable future. Writing from his home in Barrie after the Easter recess, the Senator informed him that Mrs. Gowan was seriously ill and that he could not contemplate leaving her for the remainder of the session (Gowan was then seventy-seven, his wife somewhat younger).[78] This fortuitous turn of events would keep him away from the Senate Chamber, but still allow him to exercise his useful talents to their fullest extent via the mail.

When Bill 7 was finally distributed is not known. It may not have been available before the Easter recess because the Joint Committee did not meet until April 28, ten days after Parliament reconvened.[79] Not a great deal is known directly about its deliberations since any record which it might have generated was burned in the fire of 1916. But much may be inferred from the evidence which remains.

The Committee was composed of thirty-one members: twenty-four from the Commons and seven from the Senate; all were lawyers.[80] Of the total, twenty-one were Conservatives and ten were Liberals. Only three of the latter were from the front benches of the Opposition: Mulock[81] from the Commons, and Power[82] and Scott[83] from the Senate. Each session ran for a whole morning and there were three or four sittings each week.[84] Attendance was uneven. Senator Scott, the most articulate and informed member from the Opposition, did not attend any of the meetings.[85] Another fifteen members did not intervene in any of the subsequent debates so it may be assumed that either they did not attend or, if they did, they took little or no interest in the deliberations. On one occasion at least, only three turned up: Louis Masson, a Quebec Conservative and a conscientious attendant; the Minister of Justice, who missed only one sitting, and Senator William Miller, the Chairman.

Miller had been carefully selected for the job. He was an old acquaintance of Thompson's,[86] who was making desperate and persistent attempts to insinuate himself on to the Honours List, but whose quest had so far been hampered by his problem with the bottle.[87] Apart from this failing, he was an able and effective individual who, having been Speaker of the Senate for a four-year term, was an expert in procedure and committee work. Thus, the Minister knew before he chose him that Miller would be, as he put it, "a very prompt and judicious chairman."[88]

The other Committee members posed no problems. Given that a codified format was neither a new nor an unwelcome concept to Canadian lawyers of that era and that Thompson had taken great care not to arouse any animosity or opposition to the Draft Code, it is not surprising that he found the "members who attend seem to be well disposed."[89] He kept them well disposed. According to Senator Power, they were given to understand that:

> The Joint Committee was not expected to go through the various clauses of the bill, which purported to be taken from other sources, to ascertain whether or not those clauses were exact copies of the clauses of which they purported to be the copies.[90]

Power was not contradicted by any of the Conservative Committee members, so it must be assumed that his account is essentially correct. Hence, by defining and following this procedure, Thompson was able to avoid controversial issues and to restrict discussion to only those clauses he wanted discussed. Predictably, the Bill passed smoothly through the Joint Committee. Between April 28 and June 3, in just over five weeks, there were between fifteen and twenty sessions, during which some amendments were made, and four short and non-specific Reports were submitted to both Commons and Senate. The third of these, which took the work up to section 532, or the last of the substantive law, was tabled on May 16.[91] The following day, Thompson moved the Commons into the Committee of the Whole to begin clause-by-clause study of the Bill.

What did the Opposition know about Bill 7 at this point? Not a great deal. The 1891 version had been distributed long after its introduction in the Commons, which had occurred with no fanfare and no explanation. At the same time the Minister of Justice made sure that all prominent individuals outside Parliament who would have an interest in the implementation of the legislation and who might thus voice opposition were sent a copy, their views being solicited and implemented where appropriate. Criticism was to be disarmed or diverted. The success of this ploy is attested by the fact that there was no notice given to the Bill, in fact no mention at all, in the pages of professional journals. In Parliament, first reading of the 1892 version was also effected with minimal explanation, and second reading, agreement in principle, had come and gone without any member seeing the Bill. Finally, the two- or three-line Reports of the uncontroversial proceedings of the Joint Committee had been read in the humdrum atmosphere of a House settling into the routine of the business of the day.

But Bill 7 was three hundred pages long. And although its content was infinitely simpler than what had gone before, it was by no means easily digested. Moreover, there was no indication where changes had been made to the 1891 draft. To discover what alterations had been made would have necessitated a painstaking comparison of the two versions article by article. As the writer can attest, this is no easy task. A much more difficult task, however, would have been the comparison of the 1891 Draft with the original sources to ascertain its differences from them in content and meaning. Thus, if any member of the Opposition had really wanted to know how closely Bill 7 resembled its sources and what new content had been introduced, his labour would have been long and difficult. From the evidence of the following debate it is clear that the Opposition had not made the effort, not least because Thompson had convinced them that there had been little or no change. They had taken what he said on trust.

When the Bill went to the Committee of the Whole, however, it engaged the attention of the front bench of the Opposition. Now that they were able to read the detail of the legislation, they began to perceive that changes had been made and their opposition stiffened. But because they had not read the Bill as a whole and because it was being studied clause-by-clause, seriatim, their perception was blinkered. Apart from Thompson, no one who spoke in the debates saw it as a whole, as an enactment which would make fundamental changes in the whole system of criminal law. Rather, they saw the trees but not the forest. Thompson may have anticipated this, but whether he did or not, he was happy to assist the Opposition to keep their blinkers on.

He led off with an abbreviated form of his remarks on second reading, again giving prominence to the "labours of the commission in Great Britain," and added:

> I have much gratification in stating that the Bill has received very careful and very close consideration from the members of the [Joint C]ommittee, who have taken a deep interest in its provisions.[92]

After this graceful compliment, the Chairman read the first section and the debate began. Almost immediately Thompson moved to retain the obscurity which shrouded the Bill:

> I would submit to the committee whether it is necessary for the Chairman to read the whole Bill, or only those clauses to which the committee has reported amendments.

Laurier countered by saying that he thought they "should hear the whole Bill read for the benefit of those members who were not on the committee." Thompson conceded the point.

In this way a pattern was established which was followed in this and all subsequent debates. The chairman would read a section. "Then," said Thompson, the Opposition would "try to find out what it means, dispute about whether the common law is changed or not and ask a [medley?] of questions as to whether there is anything in the Bill to this or that effect etc."[93] The principal speakers for the Liberals were David Mills and Louis Davies,[94] supported by Laurier and William Mulock.[95] Thompson was the chief Government spokesman and he dominated all the discussions. He was on his feet twenty-five times in the first debate, almost as often as the combined total of the Opposition speakers. To rebut their arguments, he first of all relied on the Imperial Commissioners, if they had expressed an opinion on the point at issue. If they had not, he defended the legislation on its own very considerable merits. If the opposition hardened and it appeared that the Liberals would dig in their heels and drag out the discussion, he conceded the point and went on to the next section. As he told Senator Gowan: "You may be sure I will not say 'all or none' . . . I believe in the proposed changes but am not dogmatic about it."[96]

Nevertheless, he found the Opposition tactics "very trying to the temper," and especially so when he was forced to concede fundamental provisions, a not infrequent occurrence.[97] A typical example of such a concession was that made after the debate on section 122. The bone of contention was sub-section one which defined a seditious intention as an intention:

> (a) To bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, or the Government and Constitution of the United Kingdom or any part of it, or of Canada or any Province thereof, or either House of Parliament of the United Kingdom, or of Canada or any Legislature, or the administration of justice; or
> (b) To excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in the State; or
> (c) To raise discontent or disaffection amongst Her Majesty's subjects; or
> (d) To promote feelings of ill-will and hostility between different classes of such subjects.

David Mills argued that "this section would alter the constitutional law as set out in the trial of Sacheverell," and would thus make any criticisms of the Queen or her government or ministers seditious offences.[98] Louis Davies also harked back to the Glorious Revolution and held that the liberty of the subject was inextricably bound up with the common law, which is "elastic and justly elastic. It is made by the prudence of the judges . . . to suit the development of the people and the constitution."[99] Thompson defended the definitions by pointing out that all those objections were met by subsection two (b), which provided that it would not be sedition

> To point out errors or defects in the Government or Constitution of the United Kingdom, or of any part of it, or of Canada or any Province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite Her Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the State. . . .[100]

He went on to develop this line of reasoning, but was careful to ground his argument in the observations of the Imperial Commissioners, his final words being:

> Lord Blackburn, Sir Charles Barry, Sir Robert Lush and Sir Fitz-James Stephens [sic] declared under their own hand that 'this is as exact an application as we can make of the existing law.'[101]

William Mulock then took the floor. He thought the section would impair freedom of speech and, in the most reasoned of the Opposition speeches, gave what he considered to be examples where free speech would be restricted or forbidden. But, more to the point, he said: "I trust that the section will be so modified as to put that right beyond all question of controversy. If the Minister will not yield the point now, I give him notice that when the bill is reported I will move to cut down that clause."[102] In fact, Thompson deleted subsection one in its entirety. Thus, the punishment for sedition was specified, but the offence itself was not defined and persons subsequently charged with sedition were subject to the exceedingly elastic definitions provided by the common law.[103]

Another disappointment for the Minister was that, item by item, his opponents forced him to abandon his plan to cut down the authority of the grand jury. For example, section 560, which laid down that magistrates only were to conduct preliminary investigations, was dropped during the seventh debate of the Committee,[104] and section 642 which stipulated that no grand jury could bring in a true bill unless it was endorsing a bill of indictment sent to it by a Crown Attorney, was eliminated in the eighth debate.[105] It is noteworthy, too, that in both instances Thompson made little effort to defend these provisions and was, indeed, noticeably eager to say, "We will drop that section," when the Opposition looked as though it would settle down to examine the issues in detail.

During the ten sessions of the Committee of the Whole, which sat during the period May 17 to June 28, substantial changes were made to Bill 7. When it was tabled in the Commons, it contained 1005 sections. 286, or 28.5%, were from English sources; 719 were new or from Canadian sources. The Criminal Code as finally enacted comprised 983 sections, of which 736, or 75%, were new or from Canadian models. Since it is unlikely that any substantive changes were made by the Joint Committee, most of the 150 amendments introduced before the Bill was sent to the Senate were made in the House of Commons.[106] These included the deletion of forty-one sections, the addition of fifteen new ones, and the textual amendment and transposition of six more. In addition to these major and immediately noticeable alterations, many provisions, such as section 87 concerning unlawful drilling, were completely rewritten; others, such as section 105 on the use of air guns, were amplified and much extended; in some, section 332 on the theft of animals, for example, amendment was limited to the elimination of redundant phrases. However, the Bill was not irreparably mutilated and was still, recognizably, the same piece of legislation. Thompson, whose philosophy was "better half a loaf than none," was overjoyed that no greater damage had been done, for what emerged after third reading on Tuesday, June 28, was much more than half a loaf.[107]

Considering the number of amendments which had been made and the necessity to incorporate them in a clean copy for the Senate, the staff of the Department of Justice and the Queen's Printer must have burned the midnight oil again to get the necessary changes made. But they did so and the Bill was taken to the Upper Chamber for first reading on Monday, July 4, where it was introduced by Prime Minister Abbott. It immediately ran into heavy weather. This was no surprise to the Government who knew that a determined effort would be made to defeat the legislation.[108]

It was an unusual situation. This was the first time in the history of the Canadian Parliament that a substantive bill considered by a Joint Committee had come before the Senate.[109] It may very well have been the only time.[110] The chief opponent was the leader of the Opposition, Senator Scott, who appears to have been the only senior Liberal to have seen the Bill from the same perspective as Thompson. Scott was, then, in a unique position. He was faced with a measure which had, in effect, the approval of the Senate, so far as the committee stage was concerned, but which had not even been read the first time in that Chamber. Moreover, as he pointed out, some of the changes to which the Senators on the Committee had agreed, had been thrown out by the Commons.[111] This had profound constitutional implications and, if properly handled by the Opposition, would have provided the opportunity for an extended debate. Since there were only six days to prorogation, and since Scott also assailed the Government for bringing on the debate at such a late date and pointed to the precedent of 1868, it was possible that such a wrangle could have occupied the legal talent in the Senate for the remainder of the session.

But Scott had by no means finished cataloguing the errors of the Government. Despite their hard work, the officials of the Justice Department, who did not normally draft legislation and follow it through the legislative process, had made a major mistake in preparing the copy which Abbott introduced in the Senate.[112] They had not printed in italics the alterations which were proposed in existing law or the amendments which the Joint Committee and House of Commons had made. Thus, without a great deal of textual comparison between the original Bill and the version the senators had, it would be impossible to ascertain what changes had been made. Scott pointed this out in a biting critique of the legislation and asked Abbott to table the copy of the original Bill used in the Commons debates, complete with amendments. He wound up his remarks by suggesting that the Government stay second reading and send the Bill instead to a committee of judges who would be required to put it in shape for introduction in the next session.[113]

Abbott, assisted by Miller, moved quickly to beat back Scott's attack verbally and to provide the House with the material requested by Scott. The Prime Minister told the members that it was impossible to procure the actual bill used in the Commons debate, but that he had already requested that a copy of it be prepared for the Senate, while Miller offered to give the Leader of the Opposition his personal copies of the original Bill as amended by the Joint Committee.[114] Eventually, after a much longer and more wide ranging debate than any that had taken place in the Commons, the Bill passed first reading.

Although the Government had effectively sidetracked Scott's initial attack, he could undoubtedly have made much more trouble on the constitutional questions during second reading. He did not choose to do so, for he apparently saw all the issues he had so far raised as merely preliminary skirmishing, as procedural road blocks which he had hoped would derail the Government, but which were secondary to his main objections. He did not want a code: "I am adverse to an innovation of this kind," and he objected in the strongest terms to the abrogation of the common law:

> . . . [F]or the first time in our history [Parliament] is . . . going to depart in so important a subject matter as the criminal law of the old country from the usages of England and Great Britain and Ireland--usages which have grown up from time immemorial. We have a great many writers on criminal law who have compiled and crystallized from time to time decisions of learned judges, and it is upon those decisions that the law largely depends. When this code is passed a large portion of the learning and experience of ages will be laid aside. Instead of looking to the text books for definitions of important crimes--homicide and murder--to the writings of learned judges who have laid down well defined principles gathered after much labour from the decisions of centuries, we shall have to take up our code and ascertain what is the interpretation of the language used in the statutes we are now about to consider.[115]

Much more to the point though, Scott had made a detailed study of at least a large portion of the Bill, so that he was able to support at length and with copious examples his contention that the legislation "alters very materially the Criminal Law of Canada."[116] In truth, if the legislation had been explored as thoroughly in second reading in the Commons as it was at that stage in the Senate, it is doubtful if the Bill, as then drafted, would have received approval in the Lower House.

Senator Scott was the first member of the Opposition to see Thompson's Bill for what it was. He also did an excellent job of informing all who would listen exactly what its effects would be and invited them to assist him in defeating it. Fortunately for Canada and for the Minister of Justice, the Senator had made a mistake which was fatal to his purpose. Although he had been appointed a member of the Joint Committee and so could have made his detailed objections known months earlier, he had never attended a meeting. And he himself had made this astonishing admission early in the debate on first reading! His behaviour obviously lost him much of the support he may have expected from traditionalists on the Conservative benches and also caused his party colleagues to be less than enthusiastic in his support. Thus the Government weathered Scott's storm, the Bill was given second reading, and the House devoted the rest of the week to considering it in the Committee of the Whole. It was given third reading and passed on Friday, July 8, and the following day received Royal assent.

In total, the Senate was occupied for twenty-eight hours with the Bill. This included the debates on first and second reading and six sessions of the Committee of the Whole. During the latter, the Senators made ninety-two amendments.[117] If the time the Commons spent in debate is included and the Senate amendments are added to the 150 made by Joint Committee and Lower House, it is obvious that the Bill received an exhaustive examination. It may have started out as Thompson's brainchild and have been based on an English model, but by the time it became law, the legislation was, in fact, a close approximation of what Canadians wanted as their criminal law.

This fact was demonstrated in an emphatic way a few months after prorogation. Mr. Justice Taschereau was on leave when the Criminal Code became law. Shortly after his return to Ottawa for the fall term, Chief

Justice Ritchie's death, while he was still in office, threw the Supreme Court into confusion. After it had settled down, Taschereau turned his attention to the recent legislation. What he learned by word of mouth gave him cause for concern, so that he asked the Justice Department for a copy of the Criminal Code and Sedgewick complied on November 3.[118] Like Senator Scott, Taschereau soon discovered that many fundamental changes had been made and he immediately realized their implications. To attempt to counter them, he decided to emulate Chief Justice Cockburn's action in 1879. He went through the Code meticulously and wrote a long and detailed critique, which he addressed to the Minister of Justice as an open letter.[119] Although much of what Taschereau said was cogent and to the point, his initiative was an utter failure. The conditions in Ottawa were completely different from those obtaining in London.

In contrast to England, Canada was a country of vast distances and separate jurisdictions. Its inhabitants were creatures of rational, written constitutions which specified the structure of the court systems and the composition of their benches. Unlike the central courts at Westminster, the Supreme Court of Canada was not supreme, and the senior provincial courts with criminal jurisdiction were unsupervised tribunals of equal and concurrent jurisdiction. Canadian legal systems were staffed with judges and lawyers who had been educated in a variety of autonomous systems different from the Inns of Court and from each other. To a greater or lesser degree, their education and professional development were hampered by a dearth of both institutional and private legal texts. Their careers followed a different pattern from that of their English counterparts so that judges came to the bench with an experience dissimilar from and more varied than that of their brethren in Westminster and they heard arguments in a familiar idiom from advocates whose training was similar to their own.

The reasons which caused the divergence of the two legal systems also predisposed Canadians to view attempts to systematize the law from a perspective different from that of their English contemporaries. Hence, when colonial legislators set out to bring order to the statutes by arranging them in a rational, topical sequence--to codify the statute law, as that concept is defined in the leading works of lexicography in the western world--their work met with approbation and acceptance by the legal profession and by society at large. For this reason, public reaction to Taschereau's open letter criticising what was perceived to be the latest version of such works ranged from censure of the Judge to indifference.[120] In some measure, Taschereau was a victim of the illusion created by the Minister of Justice, but to a far greater extent, he was out of step with the times.

To arrive at a valid and meaningful assessment of Sir John Thompson's work, the Criminal Code of 1892 should not be analysed with the benefit of a hundred years of hindsight and its flaws catalogued, as we see them now. No: the Criminal Code should be viewed rather from the perspective of a hundred years earlier, 1791, the year in which the last major jurisdiction of post-revolutionary British North America was erected. Then, the criminal law was cruel, obscure and unsystematic. From that time on, the early legislatures worked to ameliorate the cruelty of the law, to a greater or lesser extent. By the 1870s this had been completed, at least to the satisfaction of the great majority of Canadians, who saw the penal statutes as a just and fair safeguard of society. Thus, it was not Thompson's purpose to alter the substantive law. His aims were to change the form of the law, to make its process systematic and rational and, most importantly, to reduce the amorphous and baffling common law to succinct and understandable principles and to fix those principles in statute. To a very great extent he succeeded, giving Canada the first enacted criminal code in the British Empire.

The Criminal Code of 1892 had defects and deficiencies of which Sir John Thompson was well aware; many of these still remain, but its basic structure has withstood the test of time. On the one hand, it has provided the foundation for several subsequent revisions of the criminal law; on the other, the Criminal Code of today is still recognizably Thompson's work a century after its enactment, albeit amended and adapted to meet society's changing needs.

NOTES TO CHAPTER IX

[1] Morgan, Canadian Men 1912, p. 739. Thompson to Privy Council, July 27, 1887, PAC, RG 13, A3, Department of Justice, Letterbooks, reel c 14348.

[2] Morgan, Canadian Men 1912, p. 739.

[3] Canada, Statutes, Acts of the Parliament of the Dominion of Canada Relating to Criminal Law (Ottawa: Queen's Priunter, 1887).

[4] Taschereau to Thompson, November 2, 1887, Thompson Papers, reel c 9242. Taschereau knew whereof he spoke in this respect. Delivery of the volumes for the Government was probably made early in 1888. The publisher was still waiting for payment two years later. Thompson to Taschereau, January 9, 1890, Thompson Papers, reel c 10576.

[5] Thompson to Taschereau, January 9, 1890, ibid., reel c 10573.

[6] Henri E. Taschereau, The Criminal Statute Law of Canada, 2nd ed. (Toronto: Carswell, 1888) liii, 1157 pp. For reviews see Canadian Law Times, 8 (1888), 148; Canada Law Journal, 24 (1888), 391.

[7] Taschereau, Criminal Statute Law, 2nd ed., pp. iv-vi.

[8] This was a persuasive argument. According to Taschereau, his first edition, although well received by the profession, had incurred a substantial financial loss. Taschereau to Thompson, November 2, 1887, Thompson Papers, reel c 9241.

[9] Taschereau to Thompson, October 23, 1889, ibid., reel c 9246.

[10] One of the most recent manifestations of this trait had been demonstrated when he had cleared up the legal chaos in the North West Territories by the sweeping legal reforms he had introduced in 1886 and 1887. See Brown, "Unsure and Uncertain," p. 512. For an assessment of this aspect of Thompson's career, see Waite, Man from Halifax, pp. 437-38.

[11] There was no love lost between Taschereau and Burbidge either, since the latter had advised the Privy Council to refuse Taschereau's application for leave in April, 1884, on the grounds that the Judge's application had requested that the approval be forwarded to him in Hamilton, Bermuda, and had been postmarked in New York. Burbidge to Privy Council, March 2, 1884, PAC, RG 13, A3, Department of Justice, Letterbooks, reel c 14337.

[12] Taschereau to Thompson, October 23, 1889, Thompson Papers, reel c 9246.

[13] It may well be that Governor General Stanley got wind of such a

scheme and warned Thompson, because on October 30 he asked Thompson to come and see him "in reference to an important Criminal matter . . . ." Memorandum Robert Sedgewick, Deputy Minister of Justice to Thompson, October 30, 1889, Thompson Papers, reel c 10576.

[14] Great Britain, Parliament, Hansard, February 6, 1880, col. 145.

[15] See the debate on the Criminal Evidence Bill in 1891 for a succinct summary of Cameron's efforts to have such legislation enacted. House of Commons, Debates, July 27, 1891, col. 2955.

[16] Graham Parker asserts that Taschereau wrote to Thompson concerning the Criminal Code Bill of 1891 ("Origins of the Criminal Code," p. 273). This is incorrect. Taschereau's letter refers to the Supreme Court Bill (1891, 54&55 Vic., c. 26) which, as Thompson pointed out in his reply, had then passed ". . . all its stages except third reading." Bill 32, the Draft Criminal Code, was read the first time on May 12; it was never read a second time. Taschereau to Thompson, July 31, 1891, Thompson Papers, reel c 9254; Thompson to Taschereau, August 11, 1891, ibid., reel c 10698.

[17] For example, see Burbidge to Thompson, February 21, 1888, with which Burbidge sent a draft bill to abolish forfeiture on conviction of felony, and discussed proposals to make the rules of English law uniform in Canada. Thompson Papers, reel c 9242.

[18] On the title page of his Digest, Burbidge wrote: "Founded by permission on Sir James Fitzjames Stephen's Digest of the Criminal Law." An extensive search in the Stephen Papers failed to turn up a mention of this project. Nor has any reference to it been found in the few papers of Burbidge which have been discovered.

[19] Article 86, Riotous Demolition of Houses (Burbidge, Digest, p. 72), for example, contains only fifty-four words, in contrast to the 233 word sentence in R.S.C. 1886, c. 147, s. 9.

[20] Dominion legislation had by no means subsumed all the criminal law of the Provinces. See Chapter VI, Note 185.

[21] Thompson told Gowan that Masters "had done a good deal of work on the preparation of a digest of Procedure in Criminal Cases similar in plan to Burbidge's book." But as the latter was modelled on Stephen, it is a reasonable assumption that Masters, too, would have followed the same practice, using as his model Stephen's Digest of the Law of Criminal Procedure published in 1883 (London: Macmillan). Thompson to Gowan, May 3, 1892, Gowan Papers, reel m 1938.

[22] Burbidge to Thompson, November 16, 1889, Thompson Papers, reel c 9246.

[23] Loc. cit.

[24] Charles Morse, Rev. of A Digest of the Criminal Law of Canada, Legal News, 13 (1890), 81-83; review, Canadian Law Times, 10 (1890),

90-94; review, Canada Law Journal, 26 (1890), 599.

[25] Canada, Parliament, Sessional Papers, 1891, No. 66, p. 7.

[26] Like Sir Alexander Campbell before him, Thompson was determined to select his deputy on the basis of ability, since he "could not afford to take a man about whose fitness [he] could entertain a doubt (Thompson to Sir John A. Macdonald, September 21, 1887, Macdonald Papers, reel c 1683). For details of the five-months' search which eventuated in the appointment of Sedgewick, see Waite, Man from Halifax, p. 188. Sedgewick (1848-1906) was a former colleague of Thompson's at the Nova Scotia Bar and a co-founder of and lecturer at Dalhousie Law School. At the time of his appointment he was Recorder of Halifax. He was promoted to the bench of the Supreme Court of Canada by Thompson in 1893.

[27] Thompson to Gowan, May 3, 1892, Gowan Papers, reel m 1938.

[28] Bourinot, Parliamentary Procedure, p. 172.

[29] Sedgewick to F.A. McCord, Law Clerk of the House of Commons, October 22, 1890, PAC, RG 13, A3, Department of Justice, Letterbooks, reel c 14358; House of Commons, Debates, June 30, 1891, col. 1559.

[30] Canada, House of Commons, Bill No. 32 "An Act Respecting the Criminal Law," 1891; hereafter cited as D.C. 1891.

[31] In the D.C. 1891, the provenance of each section is printed in the margin adjoining the section. The main English source is the Draft Code of 1880; twenty-eight sections are taken from the Draft Code of 1879 and from various Imperial Statutes. R.S.C. 1886 is the prime Canadian source; several sections are condensed from subsequent Dominion legislation and old colonial statutes; five sections are from Burbidge's Digest, and four are new legislation. Two sources are cited for several sections of the D.C. 1891: the first source indicated, Imperial or Canadian, has been taken as the prime source of each of these sections in the compilation of the statistics in the text.

[32] D.C. 1891, s. 303. This definition is essentially the same as that given in the Criminal Code today; R.S.C. 1970, c. 34, s. 283.

[33] D.C. 1891, ss. 213, 215, 255, 264. For the common law development of sedition, see Brown, "Craftsmanship of Bias," p. 26.

[34] For an example of how a judge was able to exercise quasi-legislative authority, see the account of the trial for sedition of the Winnipeg Strike leaders in 1919, in Brown, "Craftsmanship of Bias," pp. 1-6.

[35] As to bail, cf. R.S.C. 1886, c. 174, s. 81 and D.C. 1891, s. 597. With regard to standing trial in the dock: prior to enactment of the Criminal Code, a misdemeanant was a "defendant" as in a case of tort; after 1892, his status became that of "prisoner at the bar" and he was put in the dock in charge of the jury. See Kenny, Criminal Law, p. 99; Giffard, English Laws, 1st ed., IX, 362; W.J. Tremeear, The Criminal

Code, 1st ed. (Toronto: Canada Law Book Company, 1902), p. 590, note.

[36] For a review of the common law pertaining to grand juries and indictments, see Blackstone, Commentaries, IV, 299-306. For the Imperial Commissioners on the subject of the proposed changes, see Parl. Pap., 1879 [2345], XX, 32.

[37] Germany, Statutes, Strafgesetzbuch für das deutsche Reich, ed. C. Gareis (Königsberg, 1891); Strafprosessordnung für das deutsche Reich, ed. G. Lowe (Berlin, 1892). France, Statutes, Code pénal, ed. E. Dalloz (Paris, 1881); Code d'instruction criminelle, ed. E. Dalloz (Paris, 1898).

[38] For a thorough discussion of this subject and an enumeration of the few obscure offences which were held to be punishable at common law, see Allen B. Harvey, ed., Tremeear's Annotated Criminal Code, 5th ed. (Calgary: Burroughs & Co., 1944), pp. 42-49.

[39] For a partial list of other alterations in the penal law, see Henri E. Taschereau, The Criminal Code of Canada (Toronto: Carswell, 1893), pp. iv-x.

[40] Canada, Statutes, Acts of the Parliament of the Dominion of Canada Relating to Criminal Law (Ottawa: Queen's Printer, 1891).

[41] Gowan to Thompson, November 24, 1890, Thompson Papers, reel c 9250.

[42] For example, Gowan urged Thompson not to attempt to enact the 1891 Bill, but rather to use it to "invite fair criticism" which would be reflected in subsequent legislation (Gowan to Thompson, May 18, 1891, Thompson Papers, reel c 9253). The Minister had adopted this policy at least a month previously (Sedgewick to Judge Thomas McGuire of Prince Albert, April 21, 1891, PAC RG 13, A3, Department of Justice, Letterbooks, reel c 14360). However, he took the trouble to answer Gowan and the impression his letter leaves is that the Senator's suggestion has been carefully considered in arriving at his decision. May 22, 1891, Gowan Papers, reel m 1938.

[43] Thompson to Adamson, November 24, 1890, Gowan Papers, Reel m 1938.

[44] Bourinot, Parliamentary Procedure, p. 517.

[45] House of Commons, Debates, May 12, 1891, col. 156.

[46] Great Britain, Parliament, Hansard, May 14, 1878, cols. 1936-59; April 3, 1879, cols. 310-47.

[47] See the briefing sheets prepared for Thompson by Sedgewick in which he refers specifically to Holker's speeches of 1878 and 1879. Canada, Department of Justice, file 63/94, item 117. This special file consists of several hundred heterogeneous items pertaining to the Criminal Code Bills of 1891 and 1892, and contains a full index of the

names of correspondents. It was assembled from items stripped from regular Departmental files. The topics covered range from selling tobacco to minors (item 15) to a classification scheme for degrees of homicide (item 24) and include much of Senator Gowan's correspondence for these years, including his "extended suggestions" for amending the Bills (items 49 and 49 1/2). I am indebted to the Hon. Jean Chrêtien, Minister of Justice, for allowing me to review this and other historical files held by the Department.

[48] Joseph Pope, Memoirs of the Right Honourable Sir John Alexander Macdonald (Toronto: Musson Book Company, n.d.), p. 628. See also the account in Creighton, Old Chieftain, p. 561.

[49] Waite, Man from Halifax, pp. 289-313.

[50] Senator Gowan finally received a copy on May 18, a week after first reading in the Commons. However, he appears to have been a special case, since it was forwarded to him at his home in Barrie by the Senate Postmaster. Gowan to Thompson, May 18, 1891, Thompson Papers, reel m 9253.

[51] House of Commons, Journal, July 31, 1891, p. 368.

[52] Haskins to Arthur Boyle, M.P., April 21, 1892, Canada, Department of Justice, file 65/92.

[53] Roderick C. Macleod, "The Shaping of Canadian Criminal Law, 1892 to 1902," Canadian Historical Association, Historical Papers, 1978, p. 70.

[54] Canada, Department of Justice, file 63/94, items 4, 49 and 49 1/2.

[55] Ibid., item 59.

[56] Ibid., item 66.

[57] Ibid., item 14.

[58] Ibid., item 24.

[59] Ibid., item 97. One notable group which is not represented is the professional press. Apart from a short comment in the Legal News [14 (1891), 137] to the effect that a criminal code bill had been mentioned in the throne speech, there was no direct comment, no analysis and no criticism from this source either to the Justice Department directly or in the editorial pages of legal journals during 1891. It was not until May 16, 1892, when the Code had been before Parliament for over two months, that the Legal News gave it a brief mention [15 (1892), 145]. Nothing further appeared in any legal periodical until after the enactment of the Code.

[60] House of Commons, Debates, March 8, 1892, col. 106.

[61] Dawson to Sedgewick, April 5, 1892; McCord to Thompson, April 6; circular memorandum, Dawson to all concerned, April 6, Thompson Papers, reel c 9257.

[62] House of Commons, *Debates*, April 12, 1892, col. 1312.

[63] Loc. cit.

[64] Loc. cit.

[65] Parl. Pap., 1879 [2345], XX, 7.

[66] House of Commons, *Debates*, April 12, 1892, col. 1313.

[67] Ibid., col. 1314.

[68] Ibid., col. 1316.

[69] David Mills (1831-1903): educ. local schools and University of Michigan; called to Ontario Bar 1883; Q.C. 1890; Professor of Constitutional and International Law at University of Toronto, 1888; Liberal M.P. and justice critic, 1878; Minister of Justice in Laurier Government 1897; appointed to Supreme Court of Canada, 1902.

[70] Waite, *Man from Halifax*, pp. 185, 437.

[71] See Sedgewick's briefing sheets, Canada, Department of Justice, file 63/94, item 117.

[72] He could have very easily done so, had he wished to. Senator Gowan had prepared for him a closely written, twenty-page brief on the subject. The Minister may very well have had it with him when he delivered his speech, because it is paperclipped to Sedgewick's briefing sheets, which Thompson did follow quite closely during the first half of his presentation. Loc. cit.

[73] A measure of Thompson's success in lulling the Opposition to sleep on his Bill can be seen in a remark of Senator Gowan. A month after second reading, he told Thompson: "I fancy there can be few who are really making the question *a study*. Otherwise a book I took away with me from the library [containing papers and reports which criticized the Imperial Codification Bills] and have [,] would have been *in request*." He obviously intended to keep it out since in his opinion, it "would have been a *rich find* for the enemy, in attacking your bill (*furor arma ministrat*)." However, since Thompson had been careful to anticipate all the objections the English critics had made, Gowan's initiative was well meant but unnecessary. Gowan to Thompson: the letter is undated, but it was received in the Justice Department on May 19, 1892; file 63/94, item 49.

[74] Senate, *Debates*, April 12, 1892, p. 156.

[75] Loc. cit.

[76] Ibid., p. 157.

[77] Loc. cit.

[78] Gowan to Thompson, April 21, 1892, Thompson Papers, reel c 9257.

[79] Sedgewick to Bourinot, April 27, 1892, Canada, Department of Justice, file 63/94, item 97.

[80] Senate, Debates, April 12, 1892, p. 156: House of Commons, Debates, April 12, col. 1319.

[81] William Mulock (1844-1944): educ. local schools and University of Toronto; called to Ontario Bar 1868; Q.C. 1890; Liberal M.P. 1882; Postmaster-General 1896; Chief Justice Exchequer Division, High Court of Ontario, 1905; Chief Justice of Ontario 1923.

[82] Lawrence Geoffrey Power (1841-1921): educ. St. Mary's College, Halifax, Harvard; called to Nova Scotia Bar 1866, K.C. 1905; Clerk of House of Assembly, Nova Scotia, 1867-77; called to Senate 1877; Speaker of Senate 1901-05.

[83] Richard William Scott (1825-1913); educ. local schools; called to Upper Canada Bar 1848, Q.C. 1867; M.L.A. Canada (Province) 1857, Ontario 1867; Speaker of the Ontario House of Assembly 1871; called to Senate 1874; Secretary of State in Mackenzie Government 1874; in Opposition 1878-1896; Secretary of State in Laurier Government 1896-1908.

[84] William Miller, "Incidents in the Political Career of the Late Sir John Thompson," (n.p., n.p., 1895), p. 20. A copy of this pamphlet is included in PAC, William Miller Papers.

[85] Senate, Debates, July 4, 1892, p. 386.

[86] Sedgewick to Gowan, May 25, 1892, Gowan Papers, reel m 1938; Miller, "Incidents," p. 20. For details of Miller's part in introducing Thompson to politics above the local level, see Waite, Man from Halifax, pp. 70-74.

[87] On Miller's problem with the bottle, see Sir John A. Macdonald to Thompson, December 8, 1888, Macdonald Papers, reel c 9246. On his quest for honours, see, for example, Miller to Gowan, January 9, 1892, Gowan Papers, reel m 1938; Miller to Thompson, July 4, 1892, Thompson Papers, reel c 9258, and the many letters which precede and follow these.

[88] Thompson to Gowan, May 3, 1892, Gowan Papers, reel m 1938.

[89] Thompson to Gowan, May 3, 1892, loc. cit. This was not an isolated opinion; see Sedgewick to Gowan, May 18, 1892, loc. cit.

[90] Senate, Debates, July 6, 1892, p. 476.

[91] House of Commons, Journal, May 16, 1892, p. 318.

[92] House of Commons, Debates, May 17, 1892, col. 2701.

[93] Thompson to Gowan, May 18, 1892, Gowan Papers, reel m 1889.

[94] Louis Henry Davies (1845-1924): educ. Prince of Wales Academy P.E.I.; admitted to Inner Temple and called to English Bar 1866, called to P.E.I. Bar 1867; Q.C. 1880; Liberal M.P. 1882; appointed to Supreme Court of Canada 1901; Chief Justice of Canada 1918.

[95] Thompson was not impressed with the quality of the Opposition speakers. "Mills," he said, "is well read, Laurier far from it and Davies a mere gabbler of phrases picked up in a very inferior practice" (Thompson to Gowan, June 1, 1892, Gowan Papers, reel m 1900). Considering his command of the detail of the legislation and the tactics he used so successfully to keep the Opposition in ignorance, Thompson was a little too acid in his comment. It is significant, too, that he did not mention William Mulock, whose arguments were always well reasoned and well articulated and who stopped Thompson cold during the debate on the sedition sections (Debates, May 19, 1892, cols. 2831-33).

[96] Thompson to Gowan, May 18, 1892, Gowan Papers, reel 1889.

[97] Loc. cit.

[98] House of Commons, Debates, May 19, 1892, col. 2830.

[99] Ibid., col. 2834.

[100] Ibid., col. 2831.

[101] Loc. cit.

[102] Ibid., col. 2833.

[103] For details of the development of the crime of sedition, see Brown, "Craftsmanship of Bias," pp. 7-26.

[104] House of Commons, Debates, June 13, 1892, col. 3649.

[105] Ibid., col 4228.

[106] This figure was given by Senator Scott who discussd the matter exhaustively in debate. Textual comparisons made for the present study support his information. Senate, Debates, July 5, 1892, p. 399.

[107] Telegram, Thompson to Gowan, June 27, 1892, Gowan Papers, reel m 1900.

[108] Miller to Gowan, July 2, 1892, Gowan Papers, reel 1938.

[109] Although the Revised Statutes had been sent to a Joint Committee in 1885, it will be recalled that the Bill of that year had been withdrawn before it reached the Senate.

[110] During my research on the question of the Joint Committee I talked to the Law Clerk of the House of Commons. He was intrigued when he learned of the event and informed me that it was a most unusual procedure and that he did not know of any other later instance where a joint committee had been struck to consider substantive legislation.

[111] Senate, Debates, July 4, 1892, p. 386.

[112] Sedgewick to S.E. Dawson, Queen's Printer, April 20, 1892, Canada, Department of Justice, file 63/94, item 97; Bourinot, Parliamentary Procedure, p. 172.

[113] Senate, Debates, July 4, 1892, pp. 385-87.

[114] Ibid., pp. 387-98.

[115] Ibid., July 6, 1892, p. 465.

[116] Ibid., pp. 466-69.

[117] They are enumerated in House of Commons, Journal, July 9, 1892, pp. 488-91.

[118] Sedgewick to Dawson, November 3, 1892, RG 13, A3, Department of Justice, Letterbooks, reel c 14365.

[119] All the correspondence on this incident, including Taschereau's letter and the detailed Departmental rebuttal, comprise item 107 in Canada, Department of Justice, file 63/94.

[120] Bench and bar were not hostile to the legislation, the professional press supported the Minister of Justice and the public was deaf to Taschereau's appeal. See, for example, Editorial, Legal News, 16 (1893), 65; "The Criminal Code," Canada Law Journal, 29 (1893), 94.

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Appendix 1

Lawyers and Inns of Court Men in the Parliaments of 1529, 1584 and 1640

The tables and figures set out below were derived from the data in S.T. Bindoff's The House of Commons 1509-1558 (London: Secker & Warburg, 1982); P.W. Hasler's The House of Commons 1558-1603 (London: H.M.S.O., 1981) and Brunton and Pennington, Members of the Long Parliament. "Barristers" are those members whom the authors describe as "lawyers" in the biographical notes, or refer to as inter alia readers, benchers, ancients or serjeants in the preliminary paragraphs of the note. "Other legal practitioners" are those members who attended an Inn of Court, were called to the bar, and who were then employed, for example, as a prothonotary, clerk of assize, or recorder.

	Number	Percentage
1529: 310 Members in Parliament		
Barristers	39	
Other legal practitioners	8	
TOTAL	47	15%
Inns of Court men, other than legal practitioners	19	
Legal practitioners	47	
TOTAL	66	21%
1584: 468 Members in Parliament		
Barristers	61	
Other legal practitioners	8	
TOTAL	69	15%
Inns of Court men, other than legal practitioners	118	
Legal practitioners	69	
TOTAL	187	40%
1640: 507 Members in Parliament		
Barristers	75	15%
Total members educated at Inns of Court including barristers	310	61%

Appendix 2

Capital Felonies[1] in British North America 1829-1841

Felony	Nova Scotia	Lower Canada[2]	P.E.I.	New Brunswick	Upper Canada[4]	Canada (Province)
Treason	X		X	X	X	X
Murder	X Note 3		X Note 3	X Note 3	X	X Note 3
Attempted Murder	X		X			X
Rescuing Persons convicted of murder					X	
Rape	X		X	X	X	X
Buggery			X	X	X	X
Carnal Knowledge of female under ten	X		X	X	X	X
Robbery with violence	X					X
Robbery			X	X	X	
Burglary with violence	X					X
Burglary			X	X	X	
Exhibiting lights to wreck vessel			X			X
Destruction of a ship			X			
Procuring miscarriage				X		
Refusing to disperse after reading of Riot Act					X	
Arson						
of a ship			X	X	X	X
of a building			X	X	X	X
TOTAL	7		12	10	11	11

Enabling Legislation:

Nova Scotia	1841, 4 Vic., cc. 5, 6, 9.
Prince Edward Island	1829, 10 Geo. 4, c. 11. 1836, 6 Will. 4, c. 22.
New Brunswick	1829, 9 & 10 Geo. 4, c. 21. 1831, 1 Will. 4, cc. 4, 5.
Upper Canada	1833, 3 Will. 4, c. 3.
Canada (Province)	1841, 4 & 5 Vic., cc. 25, 26, 27.

Notes:

1. Capital felonies are those for which the mandatory punishment was that the convicted person "shall suffer death as a felon."

2. Neither Quebec nor Lower Canada enacted legislation similar to that discussed in this Appendix. Rather, on four occasions, the punishment section of an English Statute which specified the death penalty was repealed and banishment from the Province was substituted therefore. See 1812, 52 Geo. 3, c. 3 (L.C.); 1824, 4 Geo. 4, cc. 4, 5, 6 (L.C.).

3. Accessories before the fact of murder were liable to the same punishment as the principal.

4. Accessories before the fact to all capital felonies were liable to the same punishment as the principal; 3 Will. 4, c. 3, s. 12 (U.C.).

Appendix 3

Capital Felonies in British North America at Confederation

Felony:	Nova Scotia	P.E.I.	New Brunswick	Canada (Province)	British Columbia[1]
Treason	X	X	X	X	X
Murder	X	X	X	X	X
Attempted Murder				X	X
Rape		X	X	X	
Buggary		X	X	X	X
Carnal Knowledge of female under ten		X	X	X	
Robbery with violence			X	X	X
Robbery		X			
Burglary with violence			X	X	X
Burglary		X			
Exhibiting lights to wreck vessel		X	X	X	
Destruction of a ship		X			
Piracy					X
Arson					
of a ship		X	X	X	
of a building		X	X	X	X
TOTAL	2	11	10	11	8

Enabing Legislation:

Nova Scotia	R.S.N.S. 1851, cc. 155-62.
Prince Edward Island	1869, 32 Vic., c. 19.
New Brunswick	1849, 12 Vic., c. 29; R.S.N.B. 1854, cc. 149-53.
Canada (Province)	C.S.C. 1859, cc. 90, 91.
British Columbia	Proclamation of Governor of British Columbia, November 19, 1958.[1]

Notes:

1. See Radzinowicz, HECL, IV, 330.

Appendix 4

Capital Felonies and Offences in the Dominion of Canada 1867-1892

Enabling Legislation	**Offence**	**Punishment**
Criminal Law Consolidation Acts 1868-1869		
1868, 31 Vic., c. 69, ss. 2, 3.	Treason	Death
1869, 32 & 33 Vic., c. 20,		
s. 1.	Murder	Death
s. 10	Attempted Murder	Death
s. 49	Rape	Death
s. 51	Carnal knowledge of a female under ten	Death
Acts to ameliorate the severity of the law		
1873, 36 Vic., cc. 50, 51.	Rape	Death, life imprisonment, or any term of imprisonment not less than seven years.
1877, 40 Vic., c. 28,		
s. 1	Attempted murder	Life imprisonment
s. 2	Carnal knowledge of a female under ten	Life imprisonment
Capital Felonies - R.S.C. 1886		
c. 140, s. 1	Treason	Death
c. 162, s. 2	Murder	Death
c. 162, s. 37	Rape	Death, life imprisonment or any term of imprisonment not less than seven years
Capital Offences - Criminal Code, 1892, 55 Vic., c. 29		
s. 65	Treason	Death
~~s. 231~~	Murder	Death
s. 127	Piracy	Death or life imprisonment
s. 267	Rape	Death or life imprisonment

Appendix 5

Regulations for the Qualification of Lawyers in British North American Jurisdiction 1867

	Nova Scotia	Lower Canada	P.E.I.	New Brunswick	Upper Canada	British Columbia
Clerkship admission examination	note 1	note 4	note 6	note 9	note 12	Candidates for admission to the bar as attorney or barrister were required to produce evidence of a call elsewhere.
Requirement to keep legal terms					note 13	
Attorney admission examination	note 2	note 4	note 7	note 10	note 14	
Barrister admission examination	note 3	note 5	note 8	note 11	note 15	
Years' service for attorney:						
with B.C.L.		3				
other degree	4	4	4	3	3	
non-graduate	5	5	5	4	5	
Years' service for barrister:						
with degree					3	
non-graduate					5	
Mandatory term of service prior to call as barrister:						
graduate			1	1		
non-graduate			1	2		
Total years service:						
graduates	4	3 or 4	5	4	3	
non-graduates	5	5	6	6	5	

Enabling Legislation:

Nova Scotia	R.S.N.S. 1864, c. 130.
Lower Canada	R.S.L.C. 1861, c. 72
Prince Edward Island	1848, 11 Vic., c. 31
New Brunswick	1863, 26 Vic., c. 23
Upper Canada	R.S.U.C. 1859, cc. 92, 93, 94.
British Columbia	1863, 26 & 27 Vic., Statute 8.

Notes:

1. Bench of the Supreme Court to prepare examination and to publish rules for its administration.
2. Bench of Supreme Course and two barristers to prepare and conduct examinations.
3. Candidates were admitted barrister and attorney simultaneously, and barristers were also counsel, advocates, proctors and solicitors, depending on the court they practiced in.
4. Examinations to be prepared and administered by the Bar Society of Lower Canada.
5. Candidates were admitted advocate, barrister, attorney and solicitor simultaneously.
6. Examination to be prepared and administered by three barristers.
7. Examination prepared and administered by Chief Justice and one puisne justice, Attorney General, Solicitor General and the senior barrister.
8. There was no examination, but there was a mandatory one-year term of service as an attorney prior to call.
9. Candidates were to be examined by members of the bar under the direction of the bench of the Supreme Court.
10. Bench of the Supreme Court and four barristers to prepare and administer examinations.
11. No examination but mandatory term of service as attorney to be served prior to call.

12. A candidate was required to pass the Law Society's examination prior to being enrolled on its books.

13. Intending attorneys and solicitors had to keep two terms, barristers four.

14. Attorney's examinations were set and administered by the Law Society.

15. There was no examination. The intending barrister was required to be enrolled on the Law Society's books for the requisite number of years.

Appendix 6

Number of lawyers in Dominion Parliaments from 1867 to 1892

Election Year	Number of members	Number of members who were lawyers	Percentage of the total
1867	181	47	26
1872	200	60	30
1874	206	53	25
1878	206	52	25
1882	210	54	25
1887	215	63	29
1891	215	70	30

Source of biographical data: J.K. Johnson, ed., The Canadian Dictionary of Parliament 1867-1967 (Ottawa: PAC, 1968).